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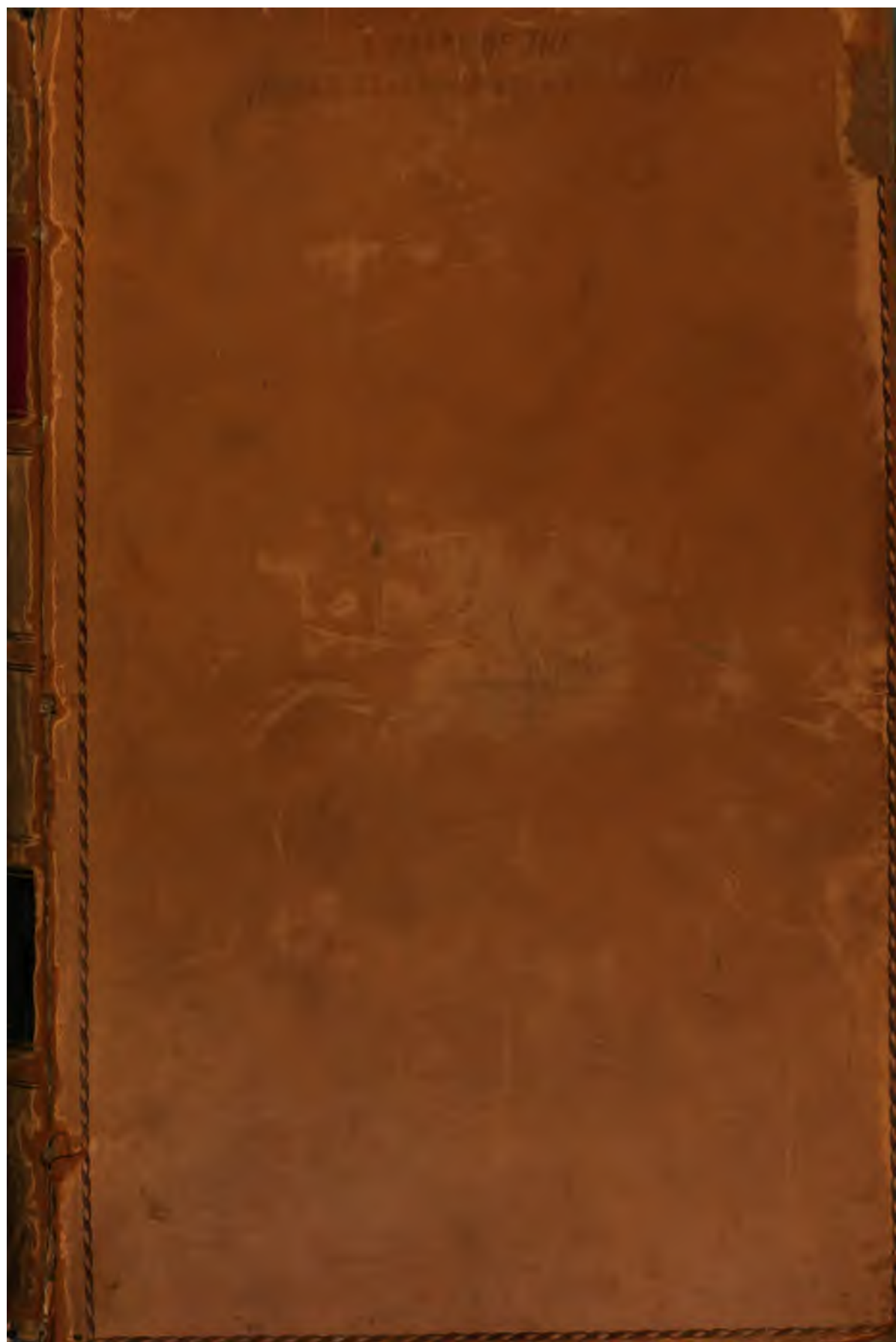
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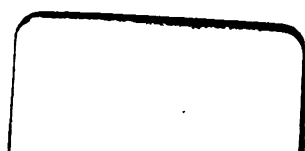
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CASES
IN THE
COURT OF COMMON PLEAS
AND
EXCHEQUER CHAMBER.

BY
JOHN SCOTT,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. VIII.

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JUDGES
OF
THE COURT OF COMMON PLEAS.

The Right Hon. Sir NICOLAS CONYNGHAM TENDAL, Knt., L. C. J.
The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.
The Hon. Sir THOMAS COLTMAN, Knt.
The Right Hon. THOMAS ERSKINE.
The Hon. Sir WILLIAM HENRY MAULE, Knt.

ATTORNEY-GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.
Sir THOMAS WILDE, Knt.

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ERRATUM.

Page 565, marginal note, line 10 from the bottom, for "duty" read "duly."

1839.

**Saturday,
June 29th.**

General damages having been given upon the whole declaration:—Held, that the allegation as to the want of notice could not be rejected, and the damages ascribed to the rest of the declaration, even if good.

1839.

CHADWICK
v.
TROWER.

Allegation of
duty in defend-
ant to give
notice of his
intention to
pull down,

and to use due
care, &c.

Breach—that
defendant
pulled down
his vaults &c.,
without giving
plaintiffs notice,

and for the purpose of carrying on their trade and business of wine-merchants, and kept and had in their said vault divers large quantities of wine, to wit, &c., and bottles, of the plaintiffs (below), of great value, to wit, of the value of 2,000*l.*; that, at the time of the committing of the grievances thereafter mentioned, the defendant (below) was about to pull down and prostrate and remove, and did pull down and prostrate certain other vaults and buildings and walls next adjoining the vault of the plaintiffs (below); *and thereupon it became and was the duty of the defendant (below), in the event of his not shoring up or protecting the plaintiffs' (below) vault in that behalf, to give due and reasonable notice to the plaintiffs (below) of his the defendant's (below) intention to pull down, prostrate, and remove the said vaults, buildings, and walls, so adjoining the plaintiffs' (below) vault, before the defendant (below) prostrated and removed the same, so as to enable the plaintiffs (below) to protect themselves in that behalf; and also to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, buildings, and walls so adjoining the plaintiffs' (below) vault, so that, for want of such care, skill, and precaution, the vault of the plaintiffs (below), and the contents thereof, might not be damaged or destroyed on that occasion, or the plaintiffs (below) injured in respect thereof: Yet the defendant (below), not regarding his duty in that behalf, but contriving and intending to injure the plaintiffs (below), theretofore, to wit, on &c., and on divers other days and times afterwards and before the commencement of the suit, wrongfully and injuriously pulled down, prostrated, and destroyed the said vaults, buildings, and walls so adjoining the vault of the plaintiffs (below), without giving the plaintiffs (below) or either of them due or reasonable or other notice of his (the defendant's (below), intention so to do, according to his said duty in that behalf, although the defendant (below) did not*

shore up or protect the plaintiffs' (below) vault; and the defendants (below) did not nor would use due care or skill, or take due, reasonable, or proper precautions in or about the pulling down or prostrating, or removing the said vaults, buildings, and walls so adjoining the vault of the plaintiffs (below), upon the said occasion, according to his duty; and the defendants (below), contriving and intending to injure the plaintiffs (below), theretofore, to wit, on &c., and on divers other days and times after that day and before the commencement of this suit, wrongfully and injuriously pulled down and prostrated divers parts of the said vaults, buildings, and walls so adjoining the vault of the plaintiffs (below), upon that occasion, in a careless, unskilful, and improper manner, and behaved and conducted himself carelessly, unskilfully, and improperly in that behalf; and by reason of the several premises in that count mentioned the vault of the plaintiffs (below) became and was greatly shaken and weakened and injured; and by reason of the several premises in that count before mentioned, and also by reason of certain timber, wood, bricks, and mortar, and other things, afterwards, to wit, on &c., falling upon the said vault of the plaintiffs (below)—and which vault, by reason of the same having been so shaken, weakened, and injured as aforesaid, and on no other account, was then unable to bear or resist the force, weight, and pressure of the said timber, wood, bricks, and mortar, and other things, as the same might and otherwise would have done—the said vault of the plaintiffs (below) then, to wit, on &c., gave way and fell in, and became and was greatly injured and destroyed; and by reason of the several premises, a great part, to wit, one half of the said wine, became wasted, lost, spoiled, and destroyed, and the residue thereof became and was and still is injured and deteriorated in value, and the said bottles were damaged and destroyed; and thereby also the plaintiffs (below) from thence hitherto lost and became deprived of the use of

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CHADWICK

v.

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and without
taking due
care, &c.,whereby the
vault was in-
jured,and the wine
destroyed, &c.

Special damage.

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 TROWER.

their said vault or cellar, and of the profits, benefits, and advantages which they otherwise might and would have acquired from the possession and use thereof, and the same became of no use or value to the plaintiffs (below); and thereby the plaintiffs (below) were greatly prejudiced and injured in their said trade and business, and necessarily incurred divers expenses, to wit, to the amount of 2,000*l.*, in having their said vault or cellar examined and surveyed, and the nature and extent of the said damages, injuries, and losses ascertained and repaired, and in and about the removal of the ruins of the said vault or cellar, and of such of the wines as were not wholly lost or destroyed, and in and about the removal of the said wine and bottles and pieces thereof, and the procuring the said vault or cellar and the ruins thereof, and the said wine and bottles, to be watched and taken care of during the times aforesaid, and otherwise in relation to the several premises and matters last aforesaid, and were otherwise injured.

First plea.

There was a plea of not guilty to the whole declaration.

Eighth plea.

To the count above set forth the defendant (below) pleaded, eighthly—as to so much of the count as related to the defendant (below) not having given the plaintiffs (below) due and reasonable notice of his intention to pull down, prostrate, and remove the said vaults, buildings, and walls in that count mentioned—that the defendant (below) was not bound by law or otherwise, nor was there any duty, obligation, or liability imposed or cast on him by law or otherwise to shore up or protect the vaults of the plaintiffs (below) on the occasion in that count mentioned, or otherwise, nor was it his duty, in the event of not shoring up or protecting the vault of the plaintiffs (below), to give due or reasonable or any notice of his the defendant's (below) intention to pull down, prostrate, and remove the said vaults, buildings, and walls adjoining the vault of the plaintiffs (below) in that count mentioned, in manner and form as the plaintiffs (below) had in that count alleged—concluding to the country.

Denial of duty
to shore up,

or to give
notice.

Ninth plea—as to so much of the second count as related to the defendant (below) not giving due and reasonable notice to the plaintiffs (below) of his intention to pull down, prostrate, and remove the said vaults, walls, and buildings adjoining the said vault of the plaintiffs (below) in that count mentioned—that, long before any damage or injury happened or was or could be caused or occasioned to the said vault of the plaintiffs (below) in that count mentioned, or to the said contents thereof, or any part thereof, the defendant (below) had made preparations for the pulling down, prostrating, and removing of the said vaults, walls, and buildings adjoining the said vault of the plaintiffs (below) in that count mentioned, and had commenced the pulling down and prostrating and removing the same, and the plaintiffs (below) had notice of and witnessed such preparations and commencement of the work of pulling down, prostrating, and removing the said vaults, walls, and buildings, in due, ample, and sufficient time before any hurt, damage, or injury was or could be done or caused to be done to their said vault and its contents in that count mentioned, or any part thereof, to have enabled themselves to protect themselves in that behalf, if they had been minded so to do; and if they had taken due and proper steps and measures in that behalf, they could and might have protected themselves from the damage and injury in that count mentioned, but that they did not take any due, proper, or sufficient, or any steps, means, or measures to protect themselves in that behalf, but wholly neglected and omitted so to do; and so the defendant (below) said that the alleged damage and injury in the said second count were not, nor was any part of them, occasioned by the omission of the defendant (below) to give them, the plaintiffs (below) notice of his intention to pull down, prostrate, and remove the said vaults, walls, and buildings adjoining the said vault of the plaintiffs (below) in that count mentioned, as the plaintiffs (below) had in that count

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CHADWICK
v.
TROWER.

Ninth plea—that plaintiffs had notice of defendant's intention to pull down his vaults and walls, and might have protected themselves.

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 CHADWICK
 v.
 TROWER.

alleged; and this the defendant (below) was ready to verify; wherefore, as to so much of the said second count as related to the premises in the introduction to that plea mentioned, he prayed judgment if the plaintiffs (below) ought to have or maintain their aforesaid action thereof against him &c.

Tenth plea.

Tenth plea—as to so much the said second count as charged the defendant (below) with not having used due care or skill, or taken due, reasonable, and proper precautions in and about the pulling down, prostrating, and removing the vaults, buildings, and walls adjoining the vault of the plaintiffs (below) in that count mentioned—that the defendant (below) did use all such due care and skill, and took all such due, reasonable, and proper precautions in and about the pulling down, prostrating, and removing the said vaults, buildings, and walls so adjoining the said vault of the plaintiffs (below), as it was his duty to have done in that behalf—concluding to the country.

That defendant
 did take due
 care &c.

Eleventh plea.

Eleventh plea—As to so much of the second count as charged it to have been the duty of the defendant (below) to have taken due and reasonable precautions in and about the pulling down and prostrating and removing the said vaults, walls, and buildings in that count mentioned, so that the vault of the plaintiffs (below), and the contents thereof, might not be damaged or destroyed, or the plaintiffs (below) injured in respect thereof—that it was not his duty to have used due and proper or any precautions in that behalf, as the plaintiffs had in that count alleged—concluding to the country.

Not the duty
 of defendant
 to adopt pre-
 cautions.

Twelfth plea.

Twelfth plea—As to so much of the second count as related to the falling of the said timber, wood, bricks, and mortar, and other things, upon the vault of the plaintiffs (below)—that the falling of the said timber, wood, bricks, and mortar, and other things, upon the said vault of the plaintiffs (below) in that count mentioned, was not, nor was the falling of any of them, or any part of them,

That the de-
 fendant not
 the proximate
 cause of the
 damage.

caused or occasioned by any act, default, omission, or neglect of the defendant (below), or the breach or neglect of any duty, obligation, or liability imposed or cast upon him by law or otherwise—verification.

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v.
TROWER.

Thirteenth plea—That the defendant (below) had good and lawful and sufficient right, title, power, and authority to pull down, prostrate, and remove the said vaults, walls, and buildings in the last count mentioned, and therein stated to have been pulled down, prostrated, and removed by him; and that the plaintiffs (below) had notice of his intention so to do before any damage or injury was or could be done or caused to be done to their said vault or cellar, and the contents thereof, or any part of such contents, in sufficient time to have enabled them to guard and protect themselves against the consequences thereof, if they had been minded or desirous so to do; and, if they had been so minded or desirous, it was their duty to have shored up and supported their said vault in that count mentioned, or to have taken other due and proper precautions to have protected themselves and their vault and its contents against the consequences of the exercise by the defendant (below) of his said right and authority to pull down, prostrate, and remove, and in and about the pulling down, prostrating, and removing the said vaults, walls, and buildings in that count mentioned; and, had they done their duty in that behalf, their said vault and its contents would have been saved and protected from the alleged damage and injuries in the last count mentioned; but they wholly neglected and omitted so to do: and the defendant (below) further said, that, in pulling down, prostrating, and removing the vaults, walls, and cellars in that count mentioned, he was not guilty of any unlawful or wrongful act or neglect or default of any duty imposed on him by law or otherwise, but exercised his said right and authority in the manner he had right and authority to exercise the same, and, if any damage or injury hap-

Thirteenth plea.

That the defendant had a right to remove his vaults;

that the plaintiffs had notice of his intention so to do;

that this was their duty to shore up their own vault,

but they omitted so to do;

that the defendant was guilty of no neglect of duty;

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CHADWICK

v.

TROWER.

and that the
damage re-
sulted from the
plaintiffs' own
default.

pened or was occasioned to the plaintiffs (below) or their said vault or its contents in that count mentioned, the same happened and was occasioned by the default of the plaintiffs (below) themselves, in not properly shoring up or supporting their said vault, or taking due and proper precautions to protect themselves and their said vault and its contents against the consequences of the exercise by the defendant (below) of his said right and authority to pull down, prostrate, and remove, and in and about the pulling down, prostrating, and removing the vaults, walls, and buildings in that count mentioned, and not by or through any unlawful or wrongful act of the defendant (below), or any neglect or omission by the defendant (below) of any duty or obligation imposed upon him by law or otherwise in and about the pulling down, prostrating, and removing the said vaults, buildings, and walls in the said second count mentioned—verification.

Replication to
the ninth plea.

The plaintiff joined issue on the first, second, third and tenth pleas; replied to the ninth plea—that the plaintiffs had not notice of and did not witness the said preparations and commencement of the work of pulling down, postrating, and removing the said vaults, walls, and buildings in due, ample, and sufficient time before any hurt, damage, or injury was or could be done or caused to be done to their said vault and its contents in the second count mentioned, to have enabled themselves to have protected themselves in that behalf, as in the said ninth plea alleged—concluding to the country, (whereupon issue was joined); and demurred to the eighth, eleventh, twelfth, and thirteenth.

The demurrers came on to be argued before the court of Common Pleas in Trinity Term, 1836; and, in Michaelmas Term following, the court pronounced judgment for the plaintiffs upon all of them—see 3 New Cases, 386, 3 Scott, 699.

The cause (as to the issues of fact) was tried before Tindal, C. J., at the Sittings at Guildhall after Hilary Term,

1837, when a verdict was found for the plaintiffs (below), with general damages (1). The defendant (below) thereupon brought a writ of error; assigning for errors—that the verdict of the jury extended over and applied to the first and second counts of the declaration, whereas the second count was bad in law, because, amongst other defects, there was no such duty arising from the premises laid in that count, either expressly or impliedly by law, and none such by law cast on the defendant (below) from the facts and circumstances stated in the second count; and, the entire damages being applicable to and extending over both counts, it was impossible to ascertain or know whether the damages assessed by the jury were in respect of the second count or of the first count, or some part thereof, or of both.

The case now came on for argument.

Wightman, for the plaintiff in error (the defendant below).—The second count is clearly bad; and therefore, as the damages are assessed generally, there must be a venire de novo. There is no allegation in the count to shew that it was the duty of the defendant below to give notice to the plaintiffs below of his intention to pull down his wall. The damage of which the plaintiffs complain arises from a complication of all the causes previously mentioned in the declaration: if any one of these turns out to be insufficient, the judgment cannot be sustained; for, it may be that the jury have given damages for a supposed breach of a duty that is not by law imposed upon the defendant. It is not necessary to impugn the decision of the court of Common Pleas upon the demurrers to the defendant's pleas in this case. Speaking of the count now under consideration, the Lord Chief Justice says: "There is no allegation in this

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v.
TROWER.
Assignment of
errors.

Second count
bad, inasmuch
as it alleges
nothing to shew
a duty imposed
upon the de-
fendant to give
notice.

Trower v.
Chadwick, 3
New Cases, 536,
3 Scott, 699.

(1) The first, second, and third issues were joined on the first, second, and third pleas to the first count; the fourth issue, on the tenth plea, to the second count;

and the fifth, on the replication to the ninth plea, to the second count: the jury found for the plaintiffs on all the issues.

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count of any right of easement in alieno solo, which forms the ground of the plaintiffs' action in the first count. And, as to the allegation that it was the defendant's duty to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore it [meaning the plaintiffs' vault] up himself, it is objected, and we think with considerable weight, that no such obligation results, as an inference of law, from the mere circumstance of the juxtaposition of the walls of the defendant and the plaintiffs. But we think ourselves not called upon on the present occasion to decide this question: for, the count goes on to allege that it was also the duty of the defendant to use due care and skill, and take due, reasonable, and proper precautions, in pulling down his walls adjoining to the plaintiffs' vault, so that, for want of *such* care, skill, and precaution, the plaintiffs' vault might not be injured; and we think that duty is clearly imposed by law; and that a breach which alleges that the defendant conducted himself so carelessly, negligently, and unskilfully in pulling down his walls as by reason thereof to injure the plaintiffs' wall, is well assigned; and that, inasmuch as this latter allegation of duty is severable from the former, it states a good ground of action." The damages might have been confined at the trial to that part of the count which alleges the damage to have resulted from the breach of the duty to use due care and skill, and take due, reasonable, and proper precautions in pulling down the defendant's wall. [*Parke*, B., referred to *Sheen v. Rickie*, 5 M. & Welsby, 175.] *Peyton v. The Mayor of London*, 9 B. & C. 725 (nom. *Peyton v. The Governors of St. Thomas's Hospital*, 4 M. & R. 625), is an authority for the defendant upon the question now before the court. That was an action on the case by a reversioner of a house in Cheapside against the owners of an adjoining house for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired and in part fell down; and it was held,

that, upon the declaration, the plaintiff could not recover on the ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; and that, as the plaintiff had not alleged or proved any right to have his house supported by the defendant's house, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it. [*Parke, B.*—It is not alleged in the second count that the plaintiffs' vault was supported at all by the defendant's vault and wall. Surely, the defendant, before any duty to give notice is cast upon him, ought to know of the existence of his neighbour's vault, and that it is supported by his wall.] Exactly so: and even the charge of negligence can hardly be sustained upon this count: the plaintiffs could have no right to expect the defendant to use extraordinary care, when he had no notice of the existence of the vault, or of the nature or value of its contents.

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W. H. Watson, contra.—The duty alleged in the second count is one that is necessarily implied by law; and, if not, the count is still sufficient to entitle the plaintiffs to judgment.

1. The count alleges that "it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' vault, to give due and reasonable notice to the plaintiffs of his, the defendant's, intention to pull down, prostrate, and remove the said vaults, buildings, and walls so adjoining the plaintiffs' vault, before the defendant prostrated and removed the same, so as to enable the plaintiffs to protect themselves in that behalf." It may be conceded that no case has yet gone the length of expressly deciding that it is obligatory on a party about to pull down his house, to give notice to his neighbour: but there will be little difficulty in shewing that such duty must necessarily be implied by law. The duty here charged

1. Duty to give notice necessarily implied by law.

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upon the defendant, is, to give his neighbours notice so far as his acts may be injurious to them. Actions of this sort have been maintained without alleging the act to have been done negligently or wrongfully. In *Slingsby v. Barnard*, 1 Roll. Rep. 480, it is said, that, if a man dig a pit in his own land so near to my house that my house falls into the pit, an action on the case lies. That case shews that a party working on his own premises, is liable for any injury his acts may occasion to his neighbour, whether he has given him notice or not. Cases of this sort are not unusual in the mining districts: see *Lord Lonsdale v. Littledale*, 2 Ves. 451. In *Jones v. Bird*, 5 B. & Ald. 837, it was held that commissioners of sewers and persons working by their order in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up if necessary, as skilful persons would do; and that they were bound to give specific notice to the owner of the house to which the stack of chimnies belonged (the falling of which occasioned the damage to the plaintiff's house), of their construction, and of the danger arising therefrom, and that a general notice to him to take proper means to secure his house, was not sufficient (2). In *Peyton v. The Mayor of London*, the court of King's Bench expressly decline to give any opinion upon this point. Lord Tenterden says: "The declaration in this case does not allege as a fact that the plaintiffs were entitled to have their house supported by the defendant's house, nor does it in our

(2) In *The Grocers' Company v. Donne*, 3 New Cases, 34, 3 Scott, 356, it was held, that, in order to render commissioners acting in the *bonâ fide* performance of a public duty liable to an action for an injury to an individual resulting from an act so done by them, it must appear that they have been guilty

of negligence or want of skill in the conduct of it. In case against commissioners of sewers for an injury done to the plaintiffs' premises by the construction of an adjoining sewer, the cause was referred to an arbitrator, who found that there were two modes of making a sewer practised in London, the one by what

opinion contain any allegation from which a title to such support can be inferred as a matter of law. The complaint also in both counts relates to the fact of taking down the defendant's house, and the manner in which that was done. The first count is evidently framed upon a supposition that it was the duty of the defendants to use the necessary means to sustain the plaintiff's house when they took down their own: the second count is more general, but it does not charge the want of notice of taking down the defendant's house, in order that the plaintiffs might themselves use the necessary means to sustain their own property, as the injury complained of: and therefore, in our opinion, the action cannot be maintained on the want of such notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand." As far, therefore, as that case is concerned, the question is still an open one. In *Brown v. Windsor*, 1 C. & J. 20, it appeared that the plaintiff's house was built, in the year 1803, against the pine end wall of the defendant's house, by permission; and that the defendant, in 1829, made an excavation in a careless and unskilful manner

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is called tunnelling, the other by what is called open cutting; that, in this case, a deep sewer could not be made either by the one mode or the other without risk of damage to the adjoining buildings; that the amount of risk varied according to the nature of the soil, which here was of a nature to make the risk considerable; that the probability of damage accruing was in *some degree less* where the sewer was made by open cutting than by tunnelling; that the sewer was made by the mode of tunnelling; that the commissioners in directing it to be made, and in the making of it, were acting *bonâ fide* in the honest

discharge of their duty as commissioners; that the sewer was fit and proper to be made for the convenient drainage of the city of London, and was made in a workman-like, skilful, and proper manner in all respects, provided that the commissioners were justified in making it by the mode of tunnelling; and that, in consequence of the making of the sewer, the plaintiffs' house was damaged to a certain amount. *It did not appear that the plaintiffs' had had any notice of the progress of the work or of the mode of doing it:—Held*, that the commissioners were not responsible for the injury so occasioned.

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in his own land, near to his pine end wall, by which he weakened his pine end wall and injured the plaintiff's house: and it was held that an action on the case was maintainable for this injury. Garrow, B., there said: "I am not distressed by *Peyton v. The Mayor of London*. It was held there, that, on that declaration, the plaintiff could not recover, because the want of notice was not alleged, and because the plaintiff neither alleged nor proved any right to have his wall supported by that of the defendant. It is said, that, by the principles of common law, and adjudged cases, a party may deal as he pleases with his own property; but I must add to that proposition, that he must so deal with it that he work no injustice to his neighbour. If, after acquiescing twenty-seven years in such an easement as the present, the defendant makes a trench so as to injure his own pine end wall, and consequentially his neighbour's property, I am of opinion that he is liable for such injury. There may be cases where a man altering his own premises, cannot support his neighbour's, and the support, if necessary, must be supplied elsewhere. *In such case he must give notice*, and then, if any injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take due precaution." [Parke, B.—The proposition, that a man must so deal with his own property as to work no injury to his neighbour's, is not quite correct, as it seems to me: he must so use his own property as to work no injury to his neighbour's *rights*. Gurney, B.—A man may by building upon his own land stop up a light which age has not matured into a right: this, though clearly injurious to his neighbour's *interest*, is no invasion of his *right*.] In *Dodd v. Holme*, 1 Ad. & E. 493, the plaintiff and defendant having adjacent lands, the former built a house at the extremity of his land; the latter afterwards excavated his own soil near to but without touching the ground so built upon. The declaration alleged that the

defendant so negligently, unskilfully, and improperly dug his own soil that the plaintiff's house was thereby injured. Bolland, B., in his summing up said—"If I have a building on my own land, which I leave in the same state, and my neighbour digs in his land adjacent, so as to pull down my wall, he is liable to an action." The jury having found that the injury to the house was the consequence of the defendant's negligence, the court refused to disturb the verdict (3). If a duty be imposed upon the defendant not to do the act carelessly, unskilfully, and incautiously, so as to injure his neighbour, it clearly is a want of due and proper caution to omit to give his neighbour notice of what he means to do, so that the party may take measures for his own protection. The want of notice is the real cause of the damage: and the right to notice necessarily arises out of the proximity of the premises. [*Parke, B.*—It seems to me that the giving of notice is no more than one of those duties of imperfect obligation, which, though binding in foro conscientiae, are not regarded by the law.]

2. Rejecting the allegation of want of notice, enough remains to entitle the plaintiffs to maintain the action; and the damages may be ascribed to that part of the declaration which is good and available. The gravamen is the omission on the part of the defendant to "use due care or skill, or take due, reasonable, or proper precautions, in or about the pulling down or prostrating or removing the said vaults, buildings, and walls so adjoining the vault of the plaintiffs, according to his duty:" and the whole

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2. Rejecting the allegation of want of notice, enough remains to support the verdict.

(3) In *Wyatt v. Harrison*, 3 B. & Ad. 871, Lord Tenterden says: "It may be true, that, if my land adjoins that of another [which it generally must do!], and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But, if I have laid an

additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." It must be observed that there his lordship was speaking with reference to the case of a *new* building.

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damage is covered by the negligence. [*Patteson, J.*—If notice had been given, and the plaintiffs had adopted the precaution of shoring up, the damage would at all events have been lessened: how then can it be assumed that the jury have not given some portion of the damages for the neglect to give notice?] No injury is alleged to have resulted to the plaintiffs from the want of notice; and after verdict the court cannot assume it. In 3 Wms. Saund. 171 c, n., it is said that, “if an action be brought for speaking words *all at one time*, that is, all in one count, and there is a verdict for the plaintiff, though some of the words will not maintain the action, yet, if any of the words will, the damages may be given entirely; for, it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation.” In *Dyeball d. Doe v. Lawrie*, 2 M. & R. 184, 8 B. & C. 74, on a writ of error brought to reverse a judgment in ejectment (4) which had been entered up generally for the plaintiff below, the ejectment having been brought for a messuage *and tenement*—Lord Tenterden said: “If ejectment lies for a tenement of any kind, this may be deemed to have been such a tenement. If not, the damages may all be applied to the messuage. It is an established rule, that, where one count contains two claims or complaints, for one of which the action is maintainable and not for the other, all the damages may be applied to the good cause of action. Where they are stated in separate counts, it is different.” [*Patteson, J.*—There is a precise issue here upon the fact of notice: and the jury have found that there was none. *Maule, B.*—You impose upon the defendant the duty of taking such care as would be required of one cognizant of the existence of your vault and of the nature of its contents; and yet you do not allege that he had any such knowledge.] *Wyatt v. Harrison*, 3 B. & Ad. 871, and *Dodd v. Holme*, 1 Ad. & E. 493,

(4) See *Doe d. Lawrie v. Dyeball*, 1 M. & P. 330.

are both authorities to shew that carelessness and want of caution in a case of this sort form a ground of action. Bayley, J., said, in *Jones v. Bird*, 5 B. & Ald. 837—"The defendants worked under a stack of chimnies, without either properly securing them or giving notice of their danger to the owner, in order that he might take them down; this was improperly and negligently working the sewer; for, if a party does an act which is improper, unless certain previous precautions are taken, he may fairly be said to do that act improperly."

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Wightman, in reply.—Divested of verbiage, the case is simply this:—The defendant pulled down his wall without giving the plaintiffs, his neighbours, previous notice; the plaintiffs were possessed of a vault of the existence of which and its contents the defendant had neither notice nor knowledge; and the removal of the defendant's wall weakened the plaintiffs' vault, insomuch that it was unable to resist the force and weight of certain timber and materials (with which for anything that appears the defendant had no connection) which fell thereon, and was thereby destroyed, with the property therein. For this the jury have given general damages. Part of these damages may have been given for the want of notice. And, as the defendant was clearly not bound to give any notice, the verdict cannot be sustained.

Reply.

PARKE, B., delivered the judgment of the court:—We are unanimously of opinion that the judgment of the court below must be reversed. The question arises upon the second count of the declaration, which states that the plaintiffs were possessed of a certain vault and of certain wine therein, and the defendant was about to pull down and did pull down and prostrate certain other vaults and buildings and walls next adjoining the vault of the plaintiffs: the count then goes on to state that thereupon it be-

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came and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' vault, to give due and reasonable notice to the plaintiffs of his, the defendant's, intention to pull down his vaults, buildings, and walls, before the defendant prostrated and removed the same, so as to enable the plaintiffs to protect themselves: it then goes on to allege another duty in the defendant, viz. to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults &c. so adjoining the plaintiffs' vault, so that, for want of such care, skill, and precaution, the plaintiffs' vault and its contents might not be damaged or destroyed, or the plaintiffs injured in respect thereof: and it then proceeds to allege as a breach that the defendant wrongfully and injuriously pulled down, prostrated, and destroyed the vaults &c. so adjoining the plaintiffs' vault, without giving them due or reasonable or other notice of his, the defendant's, intention so to do, according to his said duty in that behalf, although the defendant did not shore up or protect the plaintiffs' vault, and the defendant did not nor would use due care or skill, or take due, reasonable, or proper precautions in or about the pulling down or prostrating or removing the vaults &c. so adjoining the plaintiffs' vault, upon that occasion, according to his said duty. And a general verdict has been found for the plaintiffs, with general damages.

No *right* of the
plaintiffs in-
jured by the
act of the de-
fendant.

The plaintiffs do not in this count allege any right to have their vault supported by the vaults or walls of the defendant: therefore no *right* of their's has been injured by the act of the defendant. The duty to give notice is charged as one arising from the contiguity of the defendant's vault to that of the plaintiffs. No doubt can be entertained as to the opinion of the court of Common Pleas upon this question. The Lord Chief Justice, in delivering the judgment of the court, says: "There is no allegation in this count of any right of easement in alieno solo, which forms the ground of the plaintiffs' action in the first count. And,

as to the allegation that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore it up himself, it is objected, *and we think with considerable weight*, that no such obligation results, as an inference of law, from the mere circumstance of the juxta-position of the walls of the defendant and the plaintiffs. But we think ourselves not called upon, on the present occasion, to decide this question: for, the count goes on to allege that it was also the duty of the defendant to use due care and skill, and take due, reasonable, and proper precautions in pulling down his walls adjoining to the plaintiffs' vault, so that for want of *such* care, skill, and precaution, the plaintiffs' vault might not be injured: and we think that duty is clearly imposed by law; and that a breach which alleges that the defendant conducted himself so carelessly, negligently, and unskillfully in pulling down his walls, as by reason thereof to injure the plaintiffs' wall, is well assigned; *and that, inasmuch as this latter allegation of duty is severable from the former, it states a good ground of action.*" We do not doubt the propriety of that opinion. But we think it is impossible to say that the law imposes upon a party any duty either to give his neighbour notice or to shore up for him. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantive ground for damage: and the probability is that the main damage did result from the want of notice; for, it is obvious, that, if notice had been given, the plaintiffs might have taken precautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think the judgment must be arrested, and a venire de novo awarded.

But, supposing that the improperly pulling down the defendant's vaults and walls may be treated as the substantive cause of action; and that the second branch of the argument that has been urged on the part of the plaintiffs

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Second allegation of duty fails, in the absence of notice to the defendant of

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the existence
and nature of
the plaintiffs'
vault.

is well founded (which we think it is not) ; then the question arises, whether any such duty as that which is alleged to have been violated is by law cast upon the defendant. The duty alleged to be cast upon the defendant by reason of the proximity of his premises to those of the plaintiffs, is, " to use due care and skill, and to take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, buildings, and walls so adjoining the plaintiffs' vault, so that for want of such care, skill, and precaution, the vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed on that occasion, or the plaintiffs injured in respect thereof:" and the breach alleged is, " that the defendant did not nor would use due care or skill, or take due, reasonable, or proper precautions in or about the pulling down, prostrating, or removing the said vaults, buildings, or walls so adjoining the said vault of the plaintiffs, according to his duty." The question is whether the law imposes upon the defendant an obligation to take such care in pulling down his vaults and walls as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognizant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence : for, one degree of care would be required where no vault exists, but the soil is left in its natural and solid state ; another, where there is a vault ; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure ? We think no such obligation as that alleged exists in the absence of notice. And therefore upon this ground also we think the declaration is ad : and consequently there must be a venire de novo.

Venire de novo.

SITTINGS IN BANC AFTER TRINITY TERM.

PURSUANT TO THE STATUTE 1 & 2 VICTORIÆ, c. 32.

THE JUDGES PRESENT WERE—TINDAL, C. J., BOSANQUET, J., COLTMAN, J.,
AND ERSKINE, J.

SHARP v. NEWSHOLME and Others, Assignees of SHARP
BAYLEY, a Bankrupt.

1839.
Thursd.,
June 13th.

THIS was an action of trover brought to recover from the defendants, assignees of one Sharp Bayley, a bankrupt, the value of certain stuffs which had been claimed by the latter as being either the property of the bankrupt or in his order and disposition at the time of the bankruptcy with the consent of the true owner. The cause came on for trial, in the form of an issue under the interpleader act, before Williams, J., at the last Summer Assizes at Liverpool. The facts were as follow :—The plaintiff was a stuff-manufacturer, at Bingley, in Lancashire. Sharp Bayley, the bankrupt, was his nephew. The goods in question, according to the evidence of the plaintiff's son were sent by the plaintiff to a dyer named Bedford at Leeds for the purpose of being dyed—the directions as to the mode

In trover against assignees for good claimed by them as belong to the bankrupt, or as being in his order and disposition at the time of his bankruptcy, with the consent of the true owner, the defendants offered in evidence declarations made by the bankrupt before his bankruptcy, as to the goods in question, in the absence of the plaintiff, in order to shew an exercise of dominion over them as owner. This evidence having been rejected, and the jury having found for the plaintiff—the court sent the cause down to a new trial.

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of dyeing them to be received from the bankrupt; the dyer being told at the time by the plaintiff's son that they were the property of the plaintiff. In order to shew that the bankrupt was dealing with the goods and assuming dominion over them as owner, the defendants called the dyer. It was proposed to ask him whether the bankrupt gave any directions as to what was to be done with the goods. On the part of the plaintiff, it was objected that the declarations of the bankrupt were not evidence, being immaterial and irrelevant, and without the scope of his authority. On the other hand, it was submitted that the declarations being part of the *res gestæ*—declarations accompanying acts done by the bankrupt in relation to the subject-matter of the action—they were admissible and cogent evidence.

The learned judge, however, rejected them as irrelevant; and he told the jury, that, if they gave credit to the testimony of the plaintiff's son, there was no evidence to shew that the plaintiff had ever parted with the property.

The jury thereupon returned a verdict for the plaintiff—damages, 500*l*.

R. Alexander, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the above declarations had been improperly rejected.

Starkie and *Tomlinson* now shewed cause.—Sharp Bayley, the bankrupt, was employed by the plaintiff merely to give directions as to the dyeing of the goods: any declarations by him tending to shew them not to be the plaintiff's property, were beyond the scope of his authority, and clearly irrelevant and inadmissible, and not binding upon the plaintiff. [*Tindal*, C. J.—The statements made by the bankrupt to Bedford were not conclusive to shew that he was the owner of the goods; but the question is whether the evidence was not admissible.] It was mere hearsay evidence. To bring the case within the

6 Geo. 4, c. 16, s. 72 (5), the goods must be in the possession of the bankrupt as reputed owner thereof with the consent of the true owner.

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Alexander, in support of his rule.—Nothing is more common than the reception of declarations made by the bankrupt before his bankruptcy. In the present case it was important to ascertain what the bankrupt was doing: but the learned judge thought that what the bankrupt said or did with reference to the goods in question was not evidence. In *Thomas v. Connell*, 4 M. & Welsby, 267, it was held that declarations of a person in insolvent circumstances, tending to shew that he knew of his insolvency, are admissible in evidence to prove such knowledge, provided the fact of his insolvency be proved aliundè. Lord Abinger there says: "If the declaration of the bankrupt had stood alone, and without connexion with the other evidence in the case, such a declaration would not be admissible; but, coupled with the subsequent evidence, the fact of insolvency at the time being established, the declaration of the bankrupt was, I think, admissible for the purpose of shewing that he knew of his insolvency." And Parke, B., says: "I have always understood the general rule to be, that a verbal statement is not receivable in evidence, unless made at or about the time of an act done, and in order to explain that act; as, for instance, if it is offered to explain a person's absence from home, and is made just before or just after his departure. But, on the other hand, if a fact be proved aliundè, it is clear that a

(5) "If any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof

he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission."

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particular person's knowledge of that fact may be proved by his declaration, as was the case in *Vacher v. Cocks*," M. & M. 353. [*Tindal*, C. J.—When you offered the evidence, you offered it with a view to the subsequent establishment of the fact?] It was offered as falling within the general rule, that declarations made by the bankrupt before his bankruptcy, accompanied by acts, are evidence, as well independent of, as to shew a reputed ownership.

TINDAL, C. J.—It appears to me to be very difficult to draw the line between a declaration and a direction. If the conversation between the bankrupt and the dyer assumes the shape of a *direction*, it shewed a dealing by the bankrupt with the goods to a certain extent inconsistent with the plaintiff's title to them, and should not have been withheld from the consideration of the jury. The precise value of the evidence when received would be matter of observation to the jury: but I think it should have been left to them. The rule for a new trial must be made absolute.

BOSANQUET, J., concurred.

COLTMAN, J.—I am also of opinion that the evidence in question ought to have been submitted to the jury, however small the effect it ought to have. If any evidence that ought to have been admitted is excluded from the consideration of the jury, the defendants are entitled to have the case re-considered.

ERSKINE, J.—The clause of the bankrupt act which applies here, is the 72nd. To bring the case within that section, the defendants were bound to shew—first, that the bankrupt had taken upon himself the sale, alteration, or disposition of the property in question as owner—secondly, that that was done with the consent of the true owner. It

is impossible to say that the declarations offered did not constitute *some* evidence of the bankrupt having taken upon himself the sale, alteration, or disposition of the goods as owner. Of course the defendants were bound to go further, and to shew that this was done with the consent of the true owner. However small the effect we may suppose the rejection of this evidence to have had upon the verdict, still the circumstance of its having been withheld from the jury entitles the plaintiff to have the rule for a new trial made absolute.

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—
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Rule absolute.

PORTER v. WESTON.

Thursday,
June 13th.

THIS was an action on the case against the defendant, an attorney, for maliciously causing the plaintiff to be rendered in discharge of his bail.

The declaration stated, that, before and at the time of the committing of the grievances by the defendant as thereafter mentioned, to wit, on the 15th December, 1838, one Thomas Burbidge, according to the form of the statute in such case made and provided, caused to be issued out of her majesty's court of Queen's Bench at Westminster against the now plaintiff a certain writ of our said lady the queen called a *capias*, directed to the sheriff of Leicestershire, by which said writ, &c. &c.; which said writ afterwards, and before the delivery thereof to the sheriff of Leicestershire to be executed as thereafter mentioned, to wit, on &c., was marked and indorsed for bail for 90*l.*, by order of a judge, and delivered to the sheriff to be executed; by virtue of which said writ the sheriff afterwards, and

The plaintiff was arrested at the suit of one B., and gave bail to the sheriff. The defendant, who was B.'s attorney, influenced partly by a desire to serve one of the bail, and partly by a notion that the bail was not responsible, by working upon the apprehensions of his family, induced him to sign a paper authorising him (the defendant) to decline on his behalf to justify as bail. This paper the defendant sent to his agent, for

the purpose of doing what was necessary upon it. The agent having accidentally permitted the justification to take place, with a view to cure the defect, obtained a judge's order to render the plaintiff in discharge of his bail. The order was sent to the defendant, who caused the plaintiff to be taken upon it, and conveyed to gaol, where he remained about three weeks. In an action on the case, the declaration charged that the defendant wrongfully, injuriously, and maliciously, and without the authority of the bail, caused the plaintiff to be rendered:—Held, that malice was necessarily averred, and must be proved: and, the jury having negatived malice, the court refused to grant a new trial.

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within one calendar month from the date thereof, including the day of such date, on &c., executed the said writ, and took and arrested the now plaintiff by his body, and then had and detained him in his custody as such sheriff at the suit of the said Thomas Burbidge for the cause aforesaid; and the said sheriff thereupon and so continuing to have the now plaintiff in custody as aforesaid, afterwards, to wit, on &c. last aforesaid, carried and delivered him into and lodged him in the common gaol of the county of Leicester aforesaid, by virtue of the said writ of capias, and the said sheriff then had and detained him in his custody in the said gaol, and the plaintiff was accordingly detained in the said gaol by virtue of the said writ at the suit of the said Thomas Burbidge in the said action; and the plaintiff continuing so in custody by virtue of the said writ at the suit of the said Thomas Burbidge, afterwards, to wit, on the 28th December, 1838, caused special bail to be put in for him to the said action in her majesty's said court, and on that occasion one Thomas Shenton and one Nathan Scampton then became jointly and severally pledged and bail for the now plaintiff in the said action: yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the plaintiff, and to cause and procure him to be kept and detained in custody in the said gaol in the said action, therefore, and whilst the said Nathan Scampton was and continued such bail as aforesaid, on the 2nd January, 1839, wrongfully and injuriously and *maliciously*, without the leave or licence, direction, or authority, and against the will of the said Nathan Scampton, caused and procured to be represented to the Right Hon. Thomas, Lord Denman, the Chief Justice of the said court, that the said Nathan Scampton was desirous of surrendering the now plaintiff, in discharge of his bail in the said action, to the said common gaol of the county of Leicester; and then also, without the leave or licence, direction, or authority, and

against the will of the said Nathan Scampton, applied to the said Thomas, Lord Denman, for, and caused and procured him to make and grant, and the said Thomas, Lord Denman, did then accordingly make and grant his order in writing, whereby, after reciting that the now plaintiff had been held to special bail upon mesne process issued out of the court of Queen's Bench at Westminster in an action at the suit of the said Thomas Burbidge (the sum sworn to being 90*l.*), being the said process and action before mentioned, and that the said Nathan Scampton, one of the bail of the now plaintiff, the defendant in the said action, *being desirous of surrendering the now plaintiff* in discharge of his bail in the said action, to the said common gaol in the county of Leicester aforesaid (being the county in which the now plaintiff was arrested), the said Thomas, Lord Denman, ordered that the said Nathan Scampton might, in pursuance of the statute in such case lately made and provided, surrender and deliver the now plaintiff into the custody of the gaoler of the said common gaol in discharge of his bail in the said action, there to remain until discharged by due course of law; and that the said order should be lodged with the said gaoler at the time the now plaintiff should be so surrendered and delivered into the custody of the said gaoler: and the plaintiff in fact said that the defendant, further contriving and intending as aforesaid, afterwards, and whilst the plaintiff so continued in custody in the said gaol as aforesaid, and whilst the said Nathan Scampton continued such bail as aforesaid, to wit, on the 3rd January, 1839, wrongfully and injuriously and maliciously, and without the leave, licence, direction, or authority, and against the will of the said Nathan Scampton and the said Thomas Shenton, or either of them, and against the will or consent of the plaintiff, and without any right, title, or authority whatever, as for and on behalf of the said Nathan Scampton, surrendered and delivered the now plaintiff into the custody

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of Christopher Musson, then being gaoler of the said gaol, as for and in discharge of the plaintiff's said bail in the said action, there to remain until discharged by due course of law; and then lodged the said order with the said gaoler at the time of so surrendering and delivering the plaintiff into the custody of the said gaoler; and thereupon and thereby the said gaoler received and kept and detained the plaintiff in his custody under the said render, and as for and in discharge of the plaintiff's bail in the said action, and against their will and consent, and the will and consent of either of them, for a long time, to wit, from thence hitherto; during all which time the plaintiff had suffered great [pain and] anxiety of body and mind, and been hindered and prevented from performing and transacting his necessary and lawful affairs and business by him during that time to be performed and transacted; and the plaintiff had been and was by means of the premises otherwise greatly injured and damnified, &c.

The defendant pleaded not guilty.

At the trial before Bosanquet, J., at the last Spring Assizes for the county of Leicester, the facts that appeared in evidence were as follow:—The plaintiff had formerly lived at Leicester, where he carried on the business of a carpenter. In the Spring of 1820, being in embarrassed circumstances, he left England and went with his family to settle in Canada. Returning to Leicester in November last for the purpose of arranging his affairs, three several actions (one at the suit of Burbidge, in the declaration mentioned, for 90*l.*, another at the suit of Dalby, the partner of the present defendant, and a third at the suit of the defendant himself), in which the defendant's firm were attornies, were commenced against him, and, he having stated that he was about to return to Canada, orders were obtained under the late statute for holding him to bail. The plaintiff was accordingly arrested and carried

to Leicester gaol. On the 29th December bail was put in for the plaintiff in all the actions, and notice of bail and of justification given for the 2nd January following. The bail put in in the first action were Shenton and Scampton. Instructions were sent by Messrs. Dalby & Weston to Taylor, their agent in London, to oppose the justification of bail. In the meantime the defendant and one Bailey, partly influenced by a desire to serve Scampton, and partly by an apprehension that he was not a responsible person, obtained interviews with his wife and his mother-in-law, and, representing to them the risk Scampton would run in becoming bail for a man who would probably quit the country as soon as he obtained his liberty, induced in him a desire to recede from his engagement. Scampton accordingly called at the office of Dalby & Weston, and in consequence of the information given to him by Weston as to the extent of his liability as bail, and the state of agitation into which Weston's information had thrown his wife and family, he expressed a desire to withdraw himself, and signed a memorandum drawn by Weston to the following effect:—

“In the Common Pleas.

“Between Thomas Burbidge, plaintiff, and
William Porter, defendant.

“I, Nathan Scampton, of &c., bail for the above-named defendant in this cause, do hereby *decline to justify* as such bail; and I do hereby authorize and empower W. Taylor, of &c., to act for me in this behalf, and to *decline on my behalf to justify as the said bail*. And I do further authorize and empower the said W. Taylor to take the affidavit of justification made by me of bail in this cause off the file, if I can lawfully do so: but I hereby at all events decline and refuse to justify as bail for the defendant in this cause. As witness my hand this 1st January, 1839.

“ (signed) N. SCAMPTON.”

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Taylor having accidentally omitted to oppose the justification of bail, they were accordingly justified, and the usual orders obtained in each of the actions for the discharge of Porter. Taylor, however, conceiving the above memorandum to be an authority to get Scampton relieved from responsibility by any practicable means, obtained from Lord Denman an order for the render of Porter. Under this order the present plaintiff was detained in gaol until other bail were put in and justified. Taylor, who was called as a witness, stated that the memorandum above mentioned was transmitted to him by the defendant without any instructions as to rendering the plaintiff; but that that step was taken by himself upon his own responsibility, in consequence of his having omitted to oppose the justification. But it appeared that the order for rendering the plaintiff was sent by Taylor to the defendant, and that the defendant himself caused the plaintiff to be rendered thereon.

On the part of the defendant it was contended that there being no evidence of malice, the plaintiff was not entitled to recover. The learned judge (who at the close of the plaintiff's case had evinced an inclination to nonsuit him) left it to the jury, in the words of the declaration, to say whether or not the defendant had wrongfully and injuriously and maliciously, and without the leave, licence, direction, or authority, and against the will of Scampton, and without any right, title, or authority whatever, as for and on behalf of Scampton, surrendered and delivered Porter into the custody of Musson as for and in discharge of his bail.

The jury returned a verdict for the defendant.

M. D. Hill, in Easter Term last, moved for a new trial, on the ground of misdirection.—The declaration charges the render to have been made wrongfully and maliciously, and without the authority, and against the will of the bail.

The question is whether or not *malice* was a material and necessary averment in this declaration, or whether it was not enough that the act was unauthorized—an impertinent and unauthorized interference, conducive of injury to the plaintiff. The learned judge left the question to the jury in the terms of the declaration; in this it is conceived that he erred; he should have told the jury that it was not essential to the maintenance of the action that malice in fact should be proved. No case is to be found precisely in point. If express malice was a necessary ingredient in the action, the evidence of malice was extremely strong, almost conclusive. [*Tindal*, C. J.—Could an action be maintained against a man, who, without any malicious or sinister motive, but honestly believing that his friend will be fixed, persuades him to withdraw from the responsibility he has unwarily incurred? The defendant's object here was, not merely the relief of the bail; he acted from a notion that the bail was no sufficient security for his client. Besides, the authority procured from Scampton did not justify the render; it was a mere authority to decline on his behalf to justify. And the act was not the less malicious that it was not done strictly in pursuance of the defendant's instructions to his agent; for, he adopted it when done, and made the act his own. [*Bosanquet*, J.—I was inclined to think that the paper did authorize the defendant to render the plaintiff, seeing that it could not be carried into effect in any other way.] The authority was, to decline to justify, not to render: and it could afford no justification to the defendant unless pursued strictly.

A rule nisi having been granted—

Humfrey and *Mellor* now shewed cause.—Proof of malice was clearly necessary to entitle the plaintiff to maintain the action: and, if it were not essential, upon the facts proved the plaintiff should have been nonsuited.

It is perfectly competent to one who has become bail

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for another to render him whenever he thinks proper. If, therefore, the paper signed by Scampton was per se an authority to render the plaintiff, there was nothing to go to the jury. This is not an action against the defendant for having induced Scampton to decline to justify, but for maliciously, and without authority, and against the will of Scampton, rendering him in discharge of his bail. Now, the authority given by Scampton is, by reasonable and necessary intendment, an authority to do all that is necessary to relieve him from the responsibility he had incurred in becoming bail for the plaintiff. There was nothing to submit to the jury: the construction of the authority was matter of law for the judge to decide. Even in the case of a mercantile contract, the jury are not called upon to interpret it where its terms are clear, unambiguous, and intelligible. The course adopted by Taylor, the agent, was the proper and the only one that could be adopted.

The question was left to the jury in the very terms of the declaration. If malice was necessarily alleged, then the direction is unexceptionable. The mere circumstance of damage resulting to one from the act of another, in the absence of malice or fraud, does not afford ground for an action—*Baron v. Sleigh*, Cro. Eliz. 628. In *Mitchell v. Jenkins*, 5 B. & Ad. 588, it was held, that, in an action for a malicious arrest, malice is a question of fact for the jury, who are at liberty, but not *bound* to infer it from the want of probable cause. In that case, a creditor had caused his debtor to be arrested for 45*l.*, knowing that there was a set-off to the amount of 16*l.* 5*s.*, but instructed the bailiff who made the arrest to allow the set-off in case the debtor would settle the debt; and the judge, upon the proof of these facts, was of opinion that there was no probable cause for the arrest, and that there was malice in law, inasmuch as the act of causing the party to be arrested for a larger sum than he owed was wrongful, and therefore told the jury that the only question for them was the amount of

damages: the court granted a new trial, on the ground that it ought to have been left to the jury to find whether there was malice or not. Parke, J., there said: "I have always understood, since the case of *Johnstone v. Sutton*, 1 T. R. 510, which was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz. that the prosecution or arrest was malicious and without reasonable or probable cause: if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but, when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the judge." In *Schiebel v. Fairbain*, 1 B. & P. 388, it was held that an action on the case will not lie against a party suing out a writ, if he neglect to countermand it after payment of the debt, unless *malice* be averred: and in *Gibson v. Chaters*, 2 B. & P. 129, it was held, that, in an action for maliciously holding to bail, it was not sufficient to prove that the writ was sued out after payment of the debt, where the circumstances precluded any inference of malice. *Ravenga v. Mackintosh*, 2 B. & C. 693, 4 D. & R. 187, is an authority to the same effect. In *Spencer v. Jacob*, M. & M. 180, the plaintiff was arrested by the indorsee of a bill purporting to be drawn upon and accepted by him, but the acceptance was not his; and it was held that this did not sustain an action for a *malicious* arrest, the defendant having acted under a mistake, and without malice. In *Saxon v. Castle*, 6 Ad. & E. 652, 1 N. & P. 661, the plaintiff gave the defendants a warrant of attorney

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to enter up judgment if certain costs should be unpaid within four days after the Master should have taxed the same. The defendants procured a taxation *ex parte*, and by an incorrect representation to the Master obtained from him an allocatur for more costs than they were entitled to. By order of a judge, on summons, a new taxation was directed, pending which the defendants arrested the plaintiff; and afterwards the new taxation was had, and the costs were reduced. In an action on the case for this wrongful arrest, judgment was arrested because the declaration (which set out the facts of the case) alleged only that the defendant had "wrongfully and injuriously" delivered the writ to the sheriff, not adding "maliciously." Lord Denman there said: "I should have wished to see some authority for a statement like that in the present declaration, omitting the allegation of malice. I am of opinion that the averment of malice was necessary:" and his lordship referred to *Scheibel v. Fairbain* and *Gibson v. Chaters*. Littledale, J., said: "In trespass, where the act of arrest is in itself illegal, no averment of malice is necessary: but, in case for suing out a writ for more than is due, according to the precedents, and to the principles of distinction between actions of trespass and on the case, malice must be alleged." And Patteson, J., said: "As to the form of the declaration, I have not the slightest doubt, that, to support an action like the present, there must be malice express or implied, and that it must be alleged. If the allegation of malice were immaterial, it is not easy to say why the question as to proof should have arisen in many cases of this kind where it has been discussed whether want of probable cause was proof of malice."

Whitehurst, in support of the rule.—The defendant had no authority in fact to render the plaintiff. The paper obtained by him from the bail was obtained by improperly

working upon the fears of the female members of his family. If the authority was matter of law, it was improperly left to the jury.

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In an action of this sort, no averment or proof of express malice is necessary. All the cases cited on the part of the defendant are actions for wrongfully suing out process—instituting proceedings against the plaintiff in a court of justice. [*Bosanquet*, J.—Was not the order of Lord Denman a proceeding of a court?] Where the act is wilful, and injury results to the plaintiff, the law will imply malice; as in actions for slander or libel: and the jury should have been directed accordingly.

TINDAL, C. J.—This is an action on the case in which the charge against the defendant is, that he, wrongfully, injuriously, and *maliciously*, without the leave, license, direction, or authority of one Scampton, who had justified as bail for the plaintiff to a writ of *capias* issued out of the court of Queen's Bench, causing the plaintiff to be rendered in discharge of his bail. The jury have found a verdict for the defendant. In the progress of the cause, the plaintiff's case being closed, the learned judge who presided at the trial was called upon to nonsuit the plaintiff, on the ground that there was no evidence to shew that the defendant had been actuated by any improper or malicious motive. The learned judge, however, declined to nonsuit the plaintiff, but reserved leave to the defendant to move to have a nonsuit entered, should it become necessary. The case now comes before us, not as upon a verdict for want of or against the weight of evidence, but upon an exception taken to the mode in which the question was left to the jury. Now, it is agreed on all hands, and the learned judge has certified to us that he left the case to the jury with a very guarded direction in the very terms of the allegation in the declaration; that is, he told them, that, before they could find a verdict for the plaintiff, they

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must be satisfied that the render was made *maliciously*, and without the leave or license, direction, or authority, and against the will of the bail. And the question presented for our consideration is, whether this was a proper direction. This, as it appears to me, will depend upon whether or not the existence of malice in fact is necessary to the maintenance of the action; for, if it be not, the jury may have come to a wrong conclusion, and the defendant will be entitled to have the matter investigated before another jury.

Upon the best consideration I am able to bring to the case, I am of opinion that malice is a necessary ingredient in an action of this sort. The mere act of render of the principal by bail is not wrongful: the law allows bail of their own free will or caprice to render the party for whose appearance they have become bound. If a third party from mere motives of kindness to the bail, and with no desire to injure the principal, induces the former to render the latter, I see no reason why he should be held liable to an action. If, supposing the defendant was wholly unacquainted with the plaintiff, and had no motive to injure him, but was acting solely with a view to the benefit of the bail, he could not be liable to an action, there is an end of the question. If malice was necessary to entitle the plaintiff to maintain the action, then the question was properly left to the jury: and we are not now called upon to say whether the existence of malice was sufficiently proved or not. The case seems to me to come very near to those where the action is brought for putting in force the ordinary process of the law: in these cases, malice in fact is a necessary ingredient (6). So, in an action for taking the plaintiff before a magistrate upon an unfounded criminal charge; in which case it is not enough to shew the absence of reasonable or probable cause; to entitle the

(6) See *Grainger v. Hill*, 5 Scott, 561.

plaintiff to maintain the action, it must appear that the defendant was actuated by some malignant and improper motive. This is not unlike the case where an attorney, mistaking his client's instructions, caused a party to be arrested, for which, in the absence of proof of malice, it was held that an action would not lie. For these reasons, I am of opinion that the rule for a new trial must be discharged.

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BOSANQUET, J.—No point was made at the trial as to the necessity of proving malice: but, in leaving the case to the jury, I felt it to be my duty to say something about it. It struck me that the case fell within the principle of those wherein it has been held that malice is essential to the support of the action. I therefore told the jury, that, unless they were satisfied that the act of the defendant was malicious as well as unauthorized, the plaintiff was not entitled to a verdict. It appears to me to be a case where the process of the law has been put in force against the plaintiff, to his injury. To entitle him to recover damages for the infliction of this injury, it was incumbent on him to shew that it was the result of a malicious motive. Now, the facts that appeared in evidence were shortly these:—Weston, being the attorney for one Burbidge, at whose suit the plaintiff had been arrested and held to bail, obtained from the bail a paper the precise meaning of which may be doubtful. If it amounted to an authority to render the plaintiff, there could be no impropriety in his sending it to his agent for the purpose of being acted upon. By a mistake of the agent, the bail were justified; and, in order to cure his blunder, the agent obtained a judge's order to render the plaintiff. Whether or not the paper given by the bail to Weston was sufficient to justify the order, may be doubtful. But, having obtained the order, the agent sent it down to the defendant at Leicester, and the plaintiff was detained in custody under it until other bail were

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put in and justified. For this detention the present action is brought. It seems to me that the case is analogous to those where the process of the court has been improperly put in force against the plaintiff, in which case malice is a necessary ingredient; or to that of a person going before a magistrate with an imperfect or an untrue statement, and obtaining from him and putting in force a warrant against another, in which case the party against whom the warrant is issued cannot maintain an action without shewing malice.

COLTMAN, J.—It is agreed on all hands that the only point to be determined here is, whether malice is necessary to the maintenance of the action, or whether the plaintiff is right in contending that the mere absence of authority to do the act complained of entitles him to recover. Something has been said about the distinction between malice in law and malice in fact (7): but here there is nothing to shew either. The defendant appears to have acted bonâ fide under a notion that he had authority to do that which he did. Striking out of the declaration the charge of malice, is there enough upon the face of it to sustain this action? In Comyns's Digest, *Action upon the Case* (A), it is laid down generally, that, "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." That principle, however, is not to be carried out to the full extent without some examination. It is to be observed that nothing has been done here that the law regards as a wrong: all that has been done is, the placing the plaintiff in actual instead of constructive custody—in the custody of the gaoler, instead of in that of his bail. The case,

(7) Malice in fact is said to be without just cause or excuse. *Bro-mage v. Prosser*, 4 B. & C. 47, 6 D. & R. 296.
 an act done from ill will towards an individual; malice in law, a wrongful act intentionally done,

therefore, falls within the cases where a party has been inconvenienced by process of law issued against him, for which in the absence of malice no action lies.

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ERSKINE, J.—I fully concur with the rest of the court in holding that this rule must be discharged. The plaintiff having declared that the act complained of was *malicious*, and without authority, the learned judge told the jury that they must find both in the affirmative before they could pronounce a verdict for the plaintiff: the jury having found generally for the defendant, if this direction was wrong, the cause must be sent down again. The question, therefore, is, whether the averment of malice was material or not. The case is admitted to be one of the first impression: and consequently we must have recourse to analogous cases—cases of wrongful arrest, and malicious prosecution of criminal charges. In both these cases the injury is severe: but the want of probable cause alone will not entitle the plaintiff to recover: the jury must be satisfied that the defendant has been influenced by motives of malice. The existence of malice may be inferred from the absence of probable cause: yet it would be wrong in a judge so to direct the jury: and in one case—*Mitchell v. Jenkins*, 5 B. & Ad. 588—a new trial was granted upon that ground. I am clearly of opinion that in this case malice was a material ingredient.

Rule discharged.

1839.

Friday,
June 14th.

BROAD v. HAM.

In an action on the case for maliciously preferring a charge of felony against the plaintiff before a magistrate, the judge told the jury that the facts proved made out a case of reasonable and probable cause; but, inasmuch as there was a fact in the case calculated to shew that the defendant was acting *alio intuitu*, they might take that fact into their consideration; and, if they should think he did not *believe* at the time he made it that the charge was well founded, then there was no probable cause:—Held, that this direction was correct; and the jury having found for the plaintiff, the court refused to disturb the verdict.

CASE. The first count of the declaration stated that the defendant, contriving to injure the plaintiff, theretofore, to wit, on &c., falsely and maliciously and without any reasonable or probable cause charged the plaintiff with having feloniously stolen a certain cheque, order, and warrant for the payment and of the value of 4*l.*, of the goods and chattels of him the defendant, and upon such charge he the defendant then falsely and maliciously, and without any reasonable or probable cause, caused the plaintiff to be arrested and to be taken in custody before J. N., Esq., a magistrate &c., and then falsely and maliciously, and without any reasonable or probable cause, accused the plaintiff of the said supposed crime before the said justice, and caused the plaintiff to be examined before the said justice touching the said supposed crime, and then to be imprisoned and detained in prison by and before the said justice under such examination as aforesaid, and for a long time afterwards, that is to say, in all, twelve hours, and until the plaintiff, in order to procure his discharge from his said imprisonment, and to prevent himself from being committed to gaol for the said supposed crime, was forced to procure bail for his appearance at the Quarter Sessions of the peace to be holden &c., to answer for the said supposed crime.

The second count stated that the defendant, further contriving as aforesaid, afterwards, to wit, on &c., at the adjourned Sessions of the peace and of oyer and terminer &c., before &c., falsely and maliciously, and without any reasonable or probable cause, preferred and caused to be preferred a bill of indictment against the plaintiff for feloniously stealing of an order for the payment and of the value of 4*l.*, of the goods and chattels of the defendant, the master of the plaintiff, he the plaintiff then being the

servant of the defendant, and for feloniously stealing a warrant for the payment of and of the value of 4*l.*, of the goods and chattels of the defendant, the master of the plaintiff, he the plaintiff then being the servant of the defendant, and also for feloniously stealing another order for the payment and of the value of 4*l.*, of the goods and chattels of the defendant, and also for feloniously stealing another warrant for the payment and of the value of 4*l.*, of the goods and chattels of the defendant, unto the jurors of the grand inquest there, to wit, unto certain good and lawful men of the county aforesaid qualified according to law, then there sworn and charged to inquire for our lady the queen for the county aforesaid; and which said bill of indictment was then and there returned to the said court by the said jurors, in form aforesaid, not found; and the plaintiff was thereby wholly exonerated and discharged from the said supposed crime; and the defendant had not further prosecuted his said supposed complaint, but had wholly abandoned the same, and the said prosecution was then and now is wholly ended and determined: By means of which said several premises the plaintiff had been and was injured in his good name, credit, and reputation, and brought into public scandal and disgrace, and had suffered great pain and anxiety of body and mind; and also by reason of the premises the plaintiff necessarily incurred divers charges and expenses, to wit, to the amount of 50*l.*, in defending himself against the said prosecution and proceedings, and in relation to the premises, and in the manifestation of his innocence in that behalf, and was and is otherwise injured, &c.

The defendant pleaded not guilty.

The cause was tried before Maule, B., at the last Spring Assizes at Taunton. The facts that appeared in evidence were as follow:—The plaintiff was in the year 1836, apprenticed to the defendant, a printer and stationer at Yeovil, in Somersetshire. The premium agreed to be paid

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on that occasion was 60*l.* ; one half was paid at the time of signing the indenture ; the other half was to be paid on the 21st October, 1838, at which time half the term of apprenticeship would expire. The plaintiff and defendant had on several occasions seriously disagreed, the defendant on those occasions using very gross and abusive language. On the 19th October, the plaintiff quitted the defendant's house, and refused to return. On the 26th of the same month, the defendant wrote a letter to the plaintiff's father, containing the following passages :—

“ John (the plaintiff) had not the slightest reason for running away, but his own misconduct. I am sorry to inform you that I had lost a cheque from my till for three weeks, and that since he has been gone it has been found in his box.

“ As I made arrangement for the payment of a heavy sum the end of this month, you will I am sure excuse my asking the favour of the remittance of the premium due on the 21st. I cannot account for the rashness of John's conduct, and am truly sorry he should act so badly towards yourself and his mother, who I am quite sure deserved better things of him.”

On the 7th November, the defendant obtained a warrant against the plaintiff for his apprehension upon suspicion of having stolen the cheque above alluded to ; and on the following day he instructed his attornies to apply to the plaintiff's father for payment of the 30*l.*

The learned judge told the jury, that, in order to sustain the action, it was incumbent on the plaintiff to shew that the charge was malicious and made without reasonable or probable cause ; that the facts proved, in his opinion, made out a *primâ facie* case of reasonable and probable cause : but that, if they thought the defendant did not make the charge in the belief that the plaintiff had been guilty of stealing the cheque, but with a view to induce the father to pay the 30*l.* that had been so repeatedly demanded,

that was evidence whence they might infer an absence of probable cause.

The jury returned a verdict for the plaintiff.

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Erle, in Easter Term last, obtained a rule nisi for a new trial, on the ground of misdirection.—He submitted, that, on the facts proved, the defendant had reasonable and probable cause for instituting the inquiry, and that it was wholly immaterial whether or not he himself believed the charged to be true. And he cited *Blachford v. Dod*, 2 B. & Ad. 179; *Taylor v. Willans*, 2 B. & Ad. 845; *Venafræ v. Johnson*, 3 M. & Scott, 847, 10 Bing. 301; *Musgrove v. Newell*, 1 M. & Welsby, 582.

Bompas, Serjeant, was to have shewn cause: but the Court called on—

Erle, *Moody*, and *Butt*, to support the rule.—It stands admitted that the facts proved before the magistrate (and the truth of them was not impugned) were of themselves sufficient to shew there was reasonable and probable cause for instituting the proceedings. But it is said that the effect of that evidence is destroyed by the circumstance of the defendant not believing that the plaintiff was guilty of the offence imputed to him. This would be a most mischievous as well as novel doctrine to lay down: a man may, notwithstanding the circumstances justify the strongest suspicion, from a previous knowledge of the character and habits of the accused, believe the charge to be groundless, and still it would be his duty to put the matter in a course of investigation. The absence of belief in the truth of the charge has nothing whatever to do with the question of reasonable or probable cause. The possibility of the defendant's having been somewhat influenced by a desire to obtain the 30*l.* from the plaintiff's father, might be calculated to lead to an inference of *malice*; but it was wholly

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irrelevant to the question of reasonable or probable cause. [*Tindal*, C. J.—I think you must go the length of contending, that the defendant is excused though he *knew* the charge to be false, provided the circumstances amount to reasonable and probable cause.] The real question is, whether there were facts within the defendant's knowledge, which, if brought forward, would have established the plaintiff's innocence. The motive of the party is wholly immaterial. According to the opinion of Lords Mansfield and Loughborough in *Johnstone v. Sutton*, 1 T. R. 544, "The essential ground of this action is that a legal prosecution was carried on without a probable cause. We say this is emphatically the essential ground; because every other allegation may be implied from this; but this must be substantially and expressly proved, and cannot be implied." In *Taylor v. Willans*, the motive of the party was the sole question to be ascertained. So, in *Venaфра v. Johnson*, the motive and *belief* of the party was the essential fact to be ascertained. In *Blachford v. Dod*, it was distinctly held, that, whether or not the defendants *bonâ fide believed* that they had a reasonable cause for preferring an indictment against the plaintiff, was not a question for the jury. *Musgrove v. Newell* is a strong authority for the defendant. A., having reasonable and probable cause for supposing that B. made an assault on him with intent to rob him, went for a constable, who, on coming to the place, recognized B., and assured A. that he was a respectable man, and that he would be answerable for his coming forward to meet the charge. A., nevertheless, persisted in giving B. into custody, and on the following day preferred the same charge against him before a justice, who dismissed it. In an action by B. against A. for maliciously and without probable cause making such charge before the justice, Lord Denman, in summing up stated to the jury, that, in his opinion, the defendant had certainly reasonable and probable cause for making the complaint in the first

instance to the constable, but that, on the explanation given by the constable, that reasonable and probable cause ceased; that the question of malice then remained to be considered, which, in actions of this nature, was not confined to the ordinary meaning of the word *malice*, but comprehended any improper motive. If, therefore, the jury should be of opinion that the defendant ought to have been, and was in fact, *satisfied in his own mind of the plaintiff's innocence*, but persisted in making the charge before the magistrate from obstinacy or feelings of wounded pride, such conduct would amount to malice, within the legal meaning of the term, and the verdict ought to be for the plaintiff: but, if they were of opinion that the defendant made the charge *bonâ fide*, having reasonable and probable cause for making it, notwithstanding the explanation given by the constable, they ought to find for the defendant. It was held that this direction was wrong; for that, as the facts remained unaltered, the representation of the constable could not take away the reasonable and probable cause afforded by those facts. "If," said Lord Abinger, "the Lord Chief Justice meant to say that the constable's statement so qualified the original circumstances as to take away the probable cause, I think that was certainly a misdirection; because, the facts remaining the same, the evidence of the character or quality of the party cannot remove the probable cause afforded by them, however it may weaken the inference to be drawn from them. However such a representation might affect the mind of a reasonable man, we cannot say, if the *facts* are not altered, that the mere attestation of the constable to the respectability of the party can take away the original probable cause. It seems to me, that it would be very dangerous to allow such an attestation to affect a prosecutor, who perhaps did not believe, and was not bound to believe it."

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TINDAL, C. J.—This is an action on the case for falsely

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and maliciously, and without reasonable or probable cause, taking the plaintiff before a magistrate upon a charge of felony; and the question is whether the direction of the learned judge is sustainable in point of law or not. It may be assumed that the state of facts was such as *prima facie* to shew that there *was* reasonable and probable cause for preferring the charge. The learned judge left it to the jury to say, whether, taking into consideration the fact that the charge was accompanied by a demand of money, they would infer an absence of reasonable and probable cause. It appears to me that that was in substance leaving it to them to say whether or not the reasonable and probable cause operated on the mind of the defendant at the time he made the charge, and was the reasonable inducement for him to act as he did: and I think that direction correct. In order to afford a justification for the defendant's conduct, it must appear that there was a cause operating upon his mind at the time; and that cause must be both reasonable and probable: it must be reasonable—such as would naturally be expected to operate upon the mind of a discreet and reasonable man: and it must also be probable. Not only must this be the nature and quality of the circumstances, but they must be operating on the mind of the party when the charge is made. Therefore, it seems to me to be a reasonable and proper direction to leave it to the jury to say whether or not the cause was that on account of which the defendant instituted the proceedings, or whether he was influenced by any other motive. It seems to me that the circumstances could not amount to reasonable and probable cause as to the defendant, if the jury found that he was acting from totally distinct motives. The rule laid down in *Johnstone v. Sutton* seems to me directly to apply: nor can I distinguish it in principle from *Taylor v. Willans*, 2 B. & Ad. 845. That was an action on the case for maliciously indicting A. for perjury: it appeared that the

defendant, B., in 1824, preferred the indictment, and gave evidence before the grand jury, that the bill was found, removed into the King's Bench, and tried in 1827, and that B., who was then in custody, was brought into court under a habeas corpus obtained by his attorney, on the ground that he was a material witness; but he did not give evidence; and A. was acquitted. And Lord Tenterden said: "It was left for the jury to determine whether Taylor's non-appearance arose from a consciousness that he had no evidence to give which would support the indictment, or from any other cause. Now, the exception ultimately taken is, not that the evidence was not sufficient for the jury to draw any conclusion, but that the judge ought to have drawn it himself. It has been carried further in the argument to-day, for, it has been argued that the non-appearance of the prosecutor does not necessarily induce the conclusion of a consciousness at that time, that, when the prosecution was originally instituted, he could have given no evidence to support it. That may be so. But the conduct of a party at a late period of a cause is a material circumstance from which his motives at an earlier period may be inferred. Why might not the forbearance of Taylor to appear to give evidence at the trial, under the very peculiar circumstances of this case, raise an inference that his motive was a consciousness that he had no probable cause for instituting the prosecution? The motives of parties can only be ascertained by inference drawn from facts. The want of probable cause is in some degree a negative, and the plaintiff can only be called upon to give some, as Mr. Justice Le Blanc, a most accurate judge, says, slight evidence of such want. As, then, slight evidence will do, why might not the circumstances of this case be left to the jury as grounds for a conclusion of fact? What conclusion they would draw, is another thing. The question of probable cause is, indeed, a mixed question of fact and of law; and the rule, as expressed in *Johnstone v. Sutton*, is correct. The judge is to give his opinion on the

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law, and to leave the jury to determine the facts, which include the motives of the parties: and, where he tells them, that, if they think the prosecutor had a certain motive for his conduct, then there was probable cause, but, if he had not that motive, then there was probable cause; I think such a summing up does properly separate the law from the fact, and is conformable to the rule." I think this rule must be discharged.

BOSANQUET, J.—I am also of opinion that there is no ground for saying that the direction of the learned judge was incorrect. The principles governing cases of this kind are well known, though difficulties often arise as to their application. To support the action, it is necessary to prove the existence of malice and the absence of probable cause: the want of probable cause is evidence whence malice may be inferred; but the converse is not equally true; the want of probable cause cannot be inferred from malice, however vindictive. It is material to keep the consideration of these two distinct; though it is sometimes not easy to do so, seeing that the same facts are often evidence of both. In the present case I lay entirely out of consideration the question of malice; all that we have to ascertain is, whether or not there was evidence of want of reasonable and probable cause. That no doubt is a mixed question of law and fact; that is, if the facts are clear and undisputed, it is the duty of the judge to tell the jury whether or not they constitute reasonable and probable cause; if the facts are doubtful, or the matter depends upon circumstances from which an inference of fact is to be drawn, the jury must exercise their judgment upon the facts, and it is for the judge to tell them, as they find those facts the one way or the other, there is or is not what the law calls reasonable and probable cause. It appears to me that the direction of the learned judge in this case was not an improper application of these principles. Certain facts were proved, which, standing alone, exhibited a *prima facie* case

of reasonable and probable cause, and the learned judge so told the jury. But there was another fact in the case, viz. the demand of the money. It was not for the judge to draw an inference of fact from that. He therefore left it to the jury to say whether or not they would thence infer a disbelief on the part of the defendant of the truth of the charge—telling them, that, if that circumstance led in their minds to the conclusion that the defendant did not believe the plaintiff to be guilty of the offence imputed to him, then he (the judge) thought there was no reasonable or probable cause for preferring the charge. In *Taylor v. Willans*, the prosecutor, who was the proper person to appear to sustain the indictment, gave no evidence. The Lord Chief Justice of this court, before whom the cause was tried, told the jury, that, “if Taylor (the prosecutor) did not appear as a witness from a conviction in his own mind that he had no evidence to give which would support the indictment, then he thought there was such want of probable cause for the prosecution as would make the action maintainable.” This direction was excepted to on the ground (amongst others), that, as the facts were undisputed, the want of such probable cause was a question for the determination of the judge, and that such question was evaded by leaving the inference to be drawn by the jury that the defendant admitted the want of such probable cause: but the court of error held it to be correct. *Blachford v. Dod*, 2 B. & Ad. 179, has also been supposed to be at variance with the direction in this case. That was an action by an attorney for maliciously and without probable cause indicting him for sending a threatening letter. There being no facts in dispute, the judge very properly took upon himself as a matter of law to decide the question of reasonable or probable cause. But where, as in the present case, an inference of fact is to be drawn from the conduct of the party, it would be improper to withhold it from the consideration of the jury.

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COLTMAN, J.—I am of the same opinion. It is difficult at times to say whether the existence or the want of probable cause is a question of law for the judge or of fact for the jury. Malice and want of probable cause are totally distinct: if there be probable cause, no action will lie, though the motive of the prosecutor be ever so malicious; but, in order to ascertain whether or not the party had probable cause for instituting the proceedings, it is material to see whether he bonâ fide believed the charge to be true. Where the facts are undoubted, as in *Blachford v. Dod*, the judge is to determine whether or not they amount in law to reasonable or probable cause: there is nothing to go to the jury: the law presumes that a reasonable man will act upon reasonable inferences. Suppose the defendant to have preferred the charge solely upon the information of one whom he knew to be wholly unworthy of credit, would it not be monstrous to hold that circumstance to be inadmissible to shew a want of reasonable or probable cause? I hold it to be clearly established that inquiry may be made (by inference from his acts) as to the motives that operated upon the mind of the party, and his belief that reasonable grounds existed for instituting the inquiry.

ERSKINE, J.—I am also of opinion that the summing up of the learned judge in this case was correct. It would be monstrous to hold that one satisfied of the innocence of the accused should still be held to have reasonable or probable cause for preferring a groundless charge. Suppose he had made declarations to that effect, would not they be evidence of the want of reasonable or probable cause? The defendant in this case has not made such declarations; but he has done acts calculated to induce a belief that he was conscious of the plaintiff's innocence of the crime imputed to him. Were not these circumstances to be left to the jury? In *Blachford v. Dod*, the sole evidence whence the

belief or disbelief of the defendants was to be inferred, was, the plaintiff's letter; and the judge had as good, or better, means of drawing the proper inference from it than the jury. Here the inference was to be drawn from certain facts: and I think the learned judge did right in leaving the matter to the jury as he did.

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Rule discharged (8).

(8) See *Delegal v. Highley*, 5 Scott, 154, which seems to involve very much the same principle.

MUSKETT v. ROGERS the Elder.

THIS was an action of assumpsit on a guarantie.

The declaration stated that one William Rogers the younger, before and at the time of the making of the promise and undertaking of the defendant thereafter next mentioned, was indebted to the plaintiff in a certain sum of money, to wit, the sum of 650*l.*, and thereupon, theretofore, to wit, on the 20th August, 1835, in consideration of the premises, and that the plaintiff, at the special instance and request of the defendant, would forbear to sue the said W. Rogers the younger for the balance then due and owing by and from the said W. Rogers the younger to the plaintiff, the defendant guaranteed the payment of and then undertook and faithfully promised the plaintiff to pay him

Saturday,
June 15th.

By a guarantie the defendant engaged to pay to the plaintiff any debt due to him from the defendant's son, not exceeding 600*l.*, provided, that, before the defendant was called on in pursuance of the guarantie, the plaintiff should avail himself to the uttermost of any bonâ fide securities he held of the son; provided also, that, in case any

thing should prevent the defendant from receiving and retaining the proceeds of an execution he had levied on *his son's property*, the guarantie should be void:—Held, that the plaintiff's neglecting to adopt means to enforce payment of a bill by a party who was proved to be totally insolvent, and to have been three years and a half in gaol, where he continued, was not a breach of the condition upon which the guarantie was given:—Held also, that the circumstance of a portion of the property seized, which turned out not to be the property of the defendant's son, being afterwards recovered by the owner, neither avoided the guarantie, nor afforded ground for diminishing the amount of the defendant's liability thereon.

And, held, that the absence of an averment in the declaration that certain securities of which the plaintiff was therein alleged to have availed himself, were *all* the securities he held of the defendant's son, was no ground for arresting the judgment.

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Forbearance.

Averment that
 plaintiff held
 certain securi-
 ties,

of which he

all such sum and sums of money as then was and were due and owing to the plaintiff from and by the said W. Rogers the younger, not exceeding the sum of 600*l.* ; provided that, *before the plaintiff should call on the defendant in pursuance of that guarantie, he the plaintiff should avail himself to the utmost of any actual and bonâ fide security, lien, or deposit he the said plaintiff then held of the said W. Rogers the younger, not including accommodation bills*; provided also, that, *in case anything whatever should prevent the defendant receiving and retaining the proceeds of the execution he had levied on the property of the said W. Rogers the younger, that then that guarantie, promise, and undertaking should be void:*

and the plaintiff averred, that, at the time of the making of the said promise and undertaking of the defendant, the balance due by and from the said W. Rogers the younger to the plaintiff was 650*l.* ; that he, the defendant, confiding in the said promise and undertaking of the defendant so made as aforesaid, then and from thence continually until and at the time of the commencement of this suit did forbear and had forborne to sue the said W. Rogers the younger, the same being a long space of time, to wit, the space of three years, for the said balance so due and owing to the plaintiff as aforesaid, and every part thereof, and had not at any time sued for the same, or any part thereof; that, at the time of the making of the said promise and undertaking of the defendant, he the plaintiff held and had *certain* actual and bonâ fide securities, liens, and deposits of the said W. Rogers the younger besides and not including accommodation bills, to wit, certain deeds of the said W. Rogers the younger theretofore deposited by, and which he the plaintiff then held as a security of, the said W. Rogers the younger, and whereon the plaintiff then had a lien, and also divers, to wit, one bill of exchange for the payment of a certain sum of money amounting, to wit, to the sum of 43*l.* 14*s.* 4*d.* : and the plaintiff further said that he then

did avail and had availed himself to the utmost of all *the said* securities, liens, and deposits, besides and not including accommodation bills, which he the plaintiff then held of the said W. Rogers the younger, and did then, and had endeavoured to his utmost to raise, procure, and obtain money by the sale, disposal, and transfer of the said deeds of the said W. Rogers the younger, and to sell, transfer, and dispose thereof for value to be received by him the plaintiff, and by means thereof to obtain money or other valuable consideration, but that he the plaintiff had been unable so to do, and that the same then were and since continually hitherto had been and were worthless and of no value or avail whatever, and that he the plaintiff had never been able to, and had not at any time received anything in respect thereof: and the plaintiff further said that he did afterwards, to wit, on the day and year aforesaid, procure payment of the said bill of exchange, and did then receive the amount thereof, and the sum therein mentioned, amounting, to wit, to the said sum of 43*l.* 14*s.* 4*d.*; and that nothing prevented the defendant from receiving and retaining the proceeds of the said execution he had levied on the property of the said W. Rogers the younger, but, on the contrary, the defendant afterwards, to wit, on the day and year aforesaid, received, and from thence continually hitherto had retained the same; and the plaintiff in fact said, that, after he the plaintiff had availed himself to the utmost of all the said securities, liens, and deposits which he the plaintiff held of the said W. Rogers the younger as aforesaid, to wit, on the day and year aforesaid, there remained of the said sum of money due from the said W. Rogers the younger to the plaintiff at the time of the making of the said promise and undertaking of the defendant, and was still due from the said W. Rogers the younger, a certain large part and sum of money not exceeding the sum of 600*l.*; to wit, the sum of 596*l.* 12*s.* 9*d.*, and the said W. Rogers the younger, although he was afterwards, to wit, on

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himself to the
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&c., requested by the plaintiff so to do, had not paid the said last mentioned sum of money or any part thereof to the plaintiff, but had hitherto wholly neglected and refused so to do; of all which said several premises the defendant, afterwards, to wit, on the day and year last aforesaid, had notice: yet the defendant, although a reasonable time in that behalf had long since elapsed, and although he was afterwards, to wit, on &c., requested by the plaintiff so to do, had not as yet paid the said last mentioned sum of 596*l.* 12*s.* 9*d.*, or any part thereof, to the plaintiff, but had hitherto wholly neglected and refused so to do.

The declaration also contained a count upon an account stated.

Fourth plea.

The only material pleas were the fourth and sixth: the fourth stated that the plaintiff did avail himself to his utmost of all the securities, liens, and deposits which he held of the said W. Rogers the younger, in manner and form as the plaintiff had above in his first count in that behalf alleged; and the sixth, that the defendant was prevented from retaining the proceeds of the said execution in the said first count mentioned.

Sixth plea.

The cause was tried before Lord Abinger, C. B., at the last Spring Assizes at Hertford. The facts that appeared in evidence were as follow:—The plaintiff was a banker at St. Albans; the defendant a farmer in an adjoining county. Early in August, 1835, the defendant issued an execution for 1,888*l.* 13*s.* 5*d.* on a judgment which had been entered up some months previously on a warrant of attorney given to him by his son W. Rogers the younger, to secure a debt due to the former. The sheriff entered on the 14th, and sold on the 21st August, under an indemnity. The plaintiff, to whom Rogers the younger was considerably indebted, threatening to make him a bankrupt, the defendant gave the plaintiff the following guarantee:—

Guarantee.

“ Sir,—In consideration of your forbearing to sue my

son, William Rogers, of Bushey Hall, in the county of Hertford, Yeoman, for the balance due and owing by and from him to you, and in consideration of the natural love and affection I bear towards my said son, I hereby guarantee the payment of and do engage to pay you all such sum and sums of money as now is and are due and owing to you from and by my said son, not exceeding 600*l.*, provided that, before you call on me in pursuance of this guarantee, you avail yourself to the uttermost of any actual and bona fide security, lien, or deposit you now hold of my said son, not including accommodation bills; provided also, that, in case anything whatever shall prevent my receiving and retaining the proceeds of the execution I have levied on my said son's property, that then this guarantee shall be void."

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First proviso.

Second proviso.

After the sale, but whilst the money remained in the hands of the sheriff, a demand was made upon the sheriff by one Blake for 118*l.*, the price of certain sheep that were alleged to have been fraudulently obtained from him by Rogers the younger a few days before the seizure; and in the result an action was brought by Blake against the sheriff, in which the former had a verdict, and the present defendant paid the damages and costs in that action—270*l.* 9*s.*

Blake's action.

Amongst the securities held by the plaintiff at the time the above guarantee was given, was a dishonored acceptance of one James Critchter for 195*l.* It did not appear that any effort had been made by the plaintiff to obtain the amount of this bill from Critchter; but it was proved that Critchter was insolvent and in prison before the bill became due, and so remained at the time of the commencement of this action, and was actually brought from gaol (where he had been lying for three years and a half) to give his evidence at the trial.

Critchter's bill.

A verdict was found for the plaintiff—damages, 596*l.* 12*s.* 9*d.*

Verdict.

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Thesiger, in Easter Term last, moved for a rule nisi to enter a nonsuit, or to reduce the damages, pursuant to leave reserved to him at the trial, or to arrest the judgment. The first part of the motion rested upon the language of the second proviso in the guarantie, under which, it was contended, the instrument was to become void in the event of anything occurring to prevent the defendant from receiving the *full* benefit of his execution. The grounds upon which it was sought to reduce the damages, were two—first, that the defendant was entitled to a deduction in respect of the 270*l.* 9*s.*, the amount of the damages and costs in Blake's action—secondly, that the plaintiff had not availed himself to the uttermost of the securities in his hands, inasmuch as he did not appear to have taken any steps for the recovery of Critchter's bill. And the ground upon which the judgment was sought to be arrested, was, that the declaration did not shew that the condition of the guarantie had been complied with, inasmuch as it was not averred that the securities the plaintiff alleged he had availed himself of were *all* the securities he held of Rogers the younger.

As to the motion in arrest of judgment.

TINDAL, C. J.—Had this been pointed out as cause of special demurrer to the declaration, the objection possibly might have availed. But I think it is at all events cured by the verdict: the plaintiff could not have succeeded at the trial without giving some evidence to shew that he had in fact availed himself to the uttermost of *all* the securities held by him. If it be error upon the record, the objection is open to the defendant in another form. But I think there is no ground for it. Upon the other points the rule may go.

Platt and Channell shewed cause.—There is no pretence for disturbing the verdict. The object of the parties is manifest. The circumstances of Rogers the younger at

the time the execution was levied by his father were such that it was extremely doubtful whether that execution would not be defeated by a fiat. It clearly could not be necessary for the plaintiff, in order to satisfy the words of the first proviso, to have proceeded against Critchter upon his acceptance; such an action would have been altogether desperate and unavailing. The point was left to the jury; and there was abundant evidence to warrant their finding. It is then suggested that the plaintiff's right to recover fails either wholly or partially, inasmuch as the defendant's execution against his son was to a certain extent defeated, part of the property seized by the sheriff turning out not to be in point of law the son's property. But, can it be said that the defendant was thereby prevented from receiving or retaining the proceeds of the execution levied on *his son's property*?

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Peacock, in support of the rule.—At the time the guarantie was given, the defendant had in execution property more than enough to realize his whole debt. The arrangement entered into between him and the plaintiff undoubtedly had for its object the protection of the property against a possible bankruptcy. Suppose Blake's demand had swallowed up the whole of the fund, could it have been contended that the defendant would still have been liable under this guarantie to pay his son's debt? Both parties knew what property had been seized: the words "my said son's property" were merely used as descriptive of the property they had in view. The amount paid to Blake for damages and costs must at all events be deducted from the verdict. With respect to Critchter's acceptance, there was no evidence that he had ever even been asked for payment.

TINDAL, C. J.—It appears to me that this rule must be discharged. Regard being had to the situation and cir-

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cumstances of the several parties at the time the guarantie was given, their intention appears to me to be perfectly clear. Rogers the father, the present defendant, holds a security—a warrant of attorney—for a debt due to him from his son: judgment has been entered up on this warrant of attorney, execution issued, and the sheriff in possession under it. The plaintiff was also a creditor of Rogers the younger to a large amount. It appears (or at least it is surmised) that acts of bankruptcy had been committed by Rogers the younger: it was therefore in the contemplation of the parties that a bankruptcy was possible. The defendant would naturally be anxious to avert a fiat; and the plaintiff very unlikely to abandon the only means of preventing the defendant from sweeping away the whole of his son's effects, to the detriment of the rest of his creditors. Such being the situation of the parties, the defendant engages to pay the plaintiff all such sums of money as should be found due to him from Rogers the son, not exceeding 600*l.*; with a proviso that the defendant was not to be called upon until the plaintiff had availed himself to the uttermost of any actual bonâ fide security held by the plaintiff; and a further proviso, that, in case anything whatever should prevent the defendant from receiving and retaining the proceeds of the execution then already levied on his son's property, the guarantie should be void.

1. As to Critch-
 ter's bill.

The first point that is made on behalf of the defendant, is, that, inasmuch as Critchter's bill was not put in suit, the plaintiff had failed to avail himself to the uttermost of that security. The first answer to that is, that a precise issue was joined upon it, and the question went to the jury: it was a question purely of fact; and the jury have decided it. I am very far from saying that the plaintiff was bound to put in suit a bill which evidently must be perfectly unproductive. The proviso must have a reasonable intentment. The point, however, is disposed of by the finding of the jury.

The next point arises upon the construction of the second proviso—that, in case any thing whatever should prevent the defendant from receiving and retaining the proceeds of the execution levied *on his son's property*, the guarantie should be void. It seems to me that the meaning of that is, that the guarantie should be void only in the event of the defendant's losing the benefit of property that had been justly seized under the execution against the son. It never could have been intended that the plaintiff should vouch for all the property seized being the property of the defendant's son. It was evidently pointed at an avoidance of the execution by the issuing of a fiat against the son.

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 2. As to Blake's
 action.

BOSANQUET, J.—The first question is, whether the plaintiff has fulfilled the first condition upon which the guarantie was given, by availing himself to the uttermost of the securities he held. On the part of the defendant it has been contended that he has failed to do so, inasmuch as he has forborne to sue Critchter upon his acceptance. The precise question was put in issue in the very language of the guarantie: the jury have found for the plaintiff; and I see no reason for coming to a different conclusion. The situation of the party was such that it would have been absurd to sue him. First point.

It is further contended that the guarantie is either void altogether, or at least void pro tanto, because a portion of the property seized under the execution turned out not to be the property of Rogers the younger. It would, I think, be difficult to maintain that the guarantie could be void as to part. But the question here is, whether the proviso can attach at all. Nothing has occurred to prevent the defendant from retaining the proceeds of the execution he had levied on *his son's property*. The rule must be discharged. Second point.

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COLTMAN, J.—I am of the same opinion. The fact of the acceptor of the bill having been three years and a half in gaol was ample excuse for not suing him. That point was submitted to the jury, and they have disposed of it.—Then, with respect to the second proviso in the guarantie, it appears to me that it is a condition that must either absolutely avoid the guarantie, or altogether fail. It was doubtless introduced to guard against a bankruptcy, which would altogether defeat the execution; and I think we are bound to construe the instrument with reference to the situation and the intention of the parties at the time it was given.

ERSKINE, J.—I am of the same opinion. The object of the parties evidently was to provide against the happening of an event that would defeat the defendant's execution altogether. The second proviso never could have been meant to operate as an undertaking on the part of the plaintiff that all the property seized was the property of the defendant's son.

Rule discharged.

Thursday,
 June 19th.

MARY ANN GLADWELL, an Infant, by W. M. WHITE, her next Friend, v. STEGGALL.

A declaration in case against a surgeon for negligence, alleged that *the plaintiff*, at the request of the

THIS was an action on the case for negligence and want of skill in the defendant, a surgeon and apothecary.

The declaration stated, that, before and at the time of

defendant, *had employed the defendant* to bestow the care &c. of him, the defendant, in the profession and business of a surgeon and apothecary &c., and the defendant then accepted and entered upon such employment as such surgeon; and then proceeded to allege the duty resulting from such retainer:—Held, that it was immaterial *by whom* the defendant was retained, though a distinct issue was taken by the plea upon the retainer: and that, if the allegation of employment *by the plaintiff* was material, it was supported by proof that the plaintiff (a child about twelve years old) submitted to and received the defendant's attendance.

Held also, that the case was one in which, if necessary, the judge at the trial might have allowed an amendment under the 3 & 4 Will. 4, c. 42, s. 23, upon payment of nominal costs.

the committing of the grievances by the defendant as thereafter mentioned, to wit, on the 23rd March, 1838, *the plaintiff*, at the special instance and request of the defendant, *had employed the defendant to bestow the care, diligence, and attendance of him, the defendant, in the profession and business of a surgeon and apothecary*, which he the defendant then exercised, used, and carried on, in and about the endeavouring to cure her, the plaintiff, of a certain complaint and disorder under which she then laboured, and the defendant then accepted and entered upon *such* employment as such surgeon and apothecary as aforesaid; and thereupon it then became and was the duty of the defendant, as such surgeon and apothecary as aforesaid, to use due and proper care, skill, and diligence in and about the endeavouring to cure the plaintiff of the said complaint and disorder under which she the plaintiff then laboured as aforesaid: yet the defendant, not regarding his said duty, but contriving and intending to injure, prejudice, and aggrieve the plaintiff in this respect, did not nor would use due and proper care, skill, and diligence in and about the endeavouring to cure the plaintiff of the said complaint and disorder, but, on the contrary thereof, the defendant then conducted himself in an ignorant, unskilful, negligent, and improper manner in that behalf, in this, to wit, that the plaintiff was then suffering and enduring great pain and anguish, occasioned by an extensive and acute inflammation extending from the ankle joint of the right leg of the plaintiff, up to the knee; but the defendant adopted and pursued a mode of treatment which materially increased the said inflammation, and occasioned a decay and destruction of divers parts of the bones and integuments of the ankle of the said limb; by reason of which said several premises the plaintiff was and is greatly injured and prejudiced in her health and constitution, and was forced and obliged to permit and suffer amputation of the said limb, and thereby suffered and underwent great and unnecessary

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pain and anguish, and was and still is much reduced and weakened, and the recovery of the plaintiff had been and was thereby greatly delayed, retarded, and impeded.

The defendant pleaded—first, not guilty—secondly, that the plaintiff did not employ the defendant, nor did the defendant accept of or enter upon such employment, in manner and form as in the declaration alleged. Issue thereon.

The cause was tried before Vaughan, J., at the last Assizes at Bury St. Edmunds. The facts that appeared in evidence were as follow :—The plaintiff (who sued by prochein amy) was about twelve years of age, and resided with her parents, poor persons, at Rattlesden, in Suffolk. In the month of March, 1838, the plaintiff had been employed by a neighbouring farmer in field labour. The weather was cold and wet, and the child ill clad. Being so employed, she was seized with a pain in her right foot, and went home. A few days afterwards, the child still suffering much pain, the defendant, a clergyman in the vicinity, who practised medicine, *was sent for by the father* to attend her. The defendant accordingly attended her for some time: but extensive inflammation and ulceration ensued, and ultimately it became necessary, in consequence of the unskilful manner in which the case had been treated, that the limb should be, and it accordingly was, amputated. It appeared that a bill had been sent in by the defendant to the child's father, containing charges for attending her, as well as another child, and had been received without objection: but it turned out that this was after the commencement of the action.

It was contended, on the part of the defendant, that the issue joined on the second plea ought to be found for him, inasmuch as there was no proof of a retainer or employment of the defendant *by the plaintiff*, as alleged in the declaration.

The point was reserved, and the case went to the jury,

who returned a verdict for the plaintiff—damages 10*l.*; and power was reserved to the court to amend the declaration, under the 3 & 4 Will. 4, c. 42, s. 23, by striking out the words “by the plaintiff,” if it should be necessary, and the court should be of opinion that the case was one in which such an amendment ought to be allowed.

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Kelly, in Easter Term last, pursuant to the leave reserved, moved to enter a verdict for the defendant on the second issue.—Upon this declaration, the plaintiff was not entitled to recover, without proof of a retainer by her, there being a precise issue upon the retainer as alleged. [*Bosanquet*, J.—If the father had brought the action, he could not have recovered damages for the personal suffering of the child.] This declaration might have alleged generally that the defendant was retained; and then the objection would not have arisen. [*Tindal*, C. J.—Was not the plaintiff’s submitting to the amputation of the limb an adoption of the retainer? (9)]. This was clearly not a case for an amendment under the statute: it would be in effect striking out the defendant’s plea.

A rule nisi having been granted—

Biggs Andrews and *Gunning* now shewed cause.—There was abundant evidence to go to the jury in support of the allegation that *the plaintiff* had employed the defendant to attend her in his professional capacity: though called in by the father, and though possibly the father might have made himself liable for the bill, the retainer was *not the less* a retainer by the child. Though the father might have maintained an action for the loss of his daughter’s services, he could not recover for her personal suffering, which *here* is the grievance. The defendant might have been employed by *both*: and in an action of this nature, it is enough to

(9) The operation was not performed by the defendant, or under his direction.

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prove so much as will make out a right of action. In *Bonafous v. Walker*, 2 T. R. 126, it was held, that, under a count for a *voluntary* escape, the plaintiff may give evidence of a *negligent* escape; and the plaintiff may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape: a negligent escape being sufficient to support the action. Here, the averment of employment *by the plaintiff* was immaterial and unnecessary. In *Pippin and Wife v. Sheppard*, 11 Price, 400, the declaration stated that the defendant was retained and employed as a surgeon for a certain reasonable reward to be to him therefore paid, to treat, attend to, and cure divers grievous hurts &c. by the wife had and received, and the defendant entered upon the treatment and cure of her, yet he so carelessly, &c. &c. To this declaration there was a special demurrer, assigning for causes, that it was not stated in or by the declaration by whom the defendant was retained and employed as such surgeon as therein mentioned, to treat, attend to, or cure the hurts &c., or that the plaintiffs or either of them retained &c., or that the defendant was so retained at their or either of their special instance and request; and also that it was not stated that it was the duty of the defendant, or that he undertook or engaged properly or skilfully to conduct himself in and about the treatment or cure of the said hurts &c., nor by whom the said reasonable reward in the declaration mentioned was to be paid to the defendant. And Lord Chief Baron Richards said: "I am really at a loss to know how any declaration should be framed in this case so as to be right if this be wrong. The defendant, being a surgeon, undertakes to the public to cure wounds and other ailments of the human system, and professes himself ready to be employed by any one for that purpose. The declaration states that he was a surgeon employed for a reasonable reward to attend and cure this patient, that he entered on the treatment, &c. It is, therefore, I think, sufficiently stated that the defendant under-

took the cure. Then, negligence and improper treatment are charged, and the injurious effects of such misconduct are averred. The question, then, is, to whom was the injury done? If a stranger had sent the defendant as a surgeon to cure this woman, undertaking to pay him for his attendance, he would not be entitled to recover or sue for damage and injury done to her in consequence of the surgeon's negligence and want of skill. From the necessity of the thing, the only person who can properly sustain an action for damages for an injury done to the person of the patient, is the patient himself; for, damages could not be given on that account to any other person, although the surgeon may have been retained and employed by him to undertake the cure. The party employing the surgeon can have nothing to do with this action." The court will, at all events, should they deem it necessary, allow the declaration to be amended, by striking out the allegation of employment by the plaintiff, so as to make it accord with the declaration in the above case; and that upon payment of nominal costs only, seeing that the alteration would be merely one of form.

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Amendment.

Kelly and Byles, in support of the rule.—Upon the plaintiff's own evidence, the defendant was clearly entitled to a verdict upon the second issue. Though not directly, yet substantially the action is founded on contract: it is an action for the breach of a duty arising out of a contract—rendering the contract the only material part of the record. The declaration, which differs materially from that in the case of *Pippin v. Sheppard*, 11 Price, 400, alleges a contract between the plaintiff and defendant, and that, by reason of that contract, a duty arose, with a breach of which the defendant is charged. The circumstance of the retainer not being alleged to be for hire and reward, on the authority of that case, makes no difference. The allegation of the employment is the material allegation; and the only mode

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of traversing the duty, was, by traversing the retainer, out of which it arises—*The King v. Everett*, 2 M. & R. 35, 8 B. & C. 114. That was the case of an information under the statutes 6 Geo. 4, cc. 106, 108, for offering a bribe to an officer of the Customs: the information stated that H. was a person *employed* in the service of the Customs, that it was his *duty*, as such person so employed, to seize certain goods, and that the defendant offered to bribe H. to violate such duty: and it was held bad in arrest of judgment, for not stating the facts out of which the legal duty arose. Lord Tenterden there said: "The count in question states that Hooper was a person employed in the service of the Customs, and that it was his duty, as such person so employed, to seize. The fact alleged, therefore, is, that he was a person employed in the service of the Customs; and the inference intended to be drawn from that fact, is, that, because he was a person so employed, it was his duty to seize. This, therefore, is an allegation of matter of law, and, being so, the fact shewing the legal duty should have been stated. The governing principle upon this point was very clearly laid down in the case of *Max v. Roberts*, 12 East, 89, which came before this court upon a writ of error from the court of Common Pleas. There a fact was stated in the declaration, from which it was attempted in point of law to infer a duty; but there was there, in the words of Lord Ellenborough, as it seems to me there is here also, 'an entire absence of all circumstances or facts from which any duty could be inferred.' " In *Pippin v. Sheppard*, there was no introductory allegation of a contract, or statement of any duty arising out of such contract. But where, as in the present case, the alleged duty is founded upon the retainer, and a distinct issue is taken upon the fact of the retainer, can it be said that any part of the allegation is immaterial?

As to the
 amendment.

By the 3 & 4 Will. 4, c. 42, s. 23, amendments are only allowed in matters not material to the merits of the case,

and by the misstatement of which the opposite party cannot have been prejudiced. Here, the amendment sought is, the expunging from the declaration a material allegation upon which a distinct issue is taken. The power of amendment under this statute has not been dispensed with a miser's hand; yet no case can be found of an amendment having been allowed in respect of a matter upon which a distinct issue, going to the whole action, had been joined between the parties (10). If the issue tendered by the plea be a material one, there can be no amendment: and, if it be an immaterial one, then the justice of the case will be met by entering judgment non obstante veredicto. At all events, the amendment, if allowed, should be made on such terms as will put the defendant in the same situation as if the proper course had been adopted (11).

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TINDAL, C. J.—This case comes before us upon the second issue, which is a traverse of an allegation in the declaration. The declaration is not framed as on a contract, but for breach of a duty resulting from an alleged employment of the defendant by the plaintiff: the traverse is “that the plaintiff did not employ the defendant, nor did the defendant accept of or enter upon such employment, in manner and form as in the declaration alleged.” I can easily conceive, that, if this had been an action ex contractu—the declaration stating that the defendant, in consideration that he had been retained and employed by the plaintiff as a surgeon and apothecary, for a certain

As to the form
of the declara-
tion.

(10) *Norcutt v. Mottram*, 7 Scott, 176, is precisely that case. There, a declaration in trover by the assignee of an insolvent debtor, charging a conversion *in the time of the assignee*, was allowed to be amended at the trial by alleging a conversion *before the insolvency*—though there was an issue on the *plaintiff's* pos-

session—the real question to be tried not being thereby varied.

(11) That is, by putting the defendant in the same condition with regard to costs, as if he had had a verdict upon the second plea, and the plaintiff had moved for judgment non obstante veredicto on the ground of its immateriality.

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Evidence.

reasonable reward to be to him therefore paid, undertook her cure—there might have been ground to doubt whether upon the evidence given in this case the jury could have found for the defendant. But this is an action of tort; and upon this issue I think there was not only evidence to go to the jury, but evidence enough to support the verdict. One observation that naturally suggests itself, is, that none but the present plaintiff could recover damages in respect of the personal suffering inflicted upon her through the defendant's negligence and want of skill. Another observation is, that the form in which the issue is taken does not at all vary the extent of the defendant's duty: he is bound to exercise the same degree of care and skill by whomsoever he might be called in. It appeared, that, the defendant being sent for, the plaintiff (she being of reasonable years) allowed him to attend her. That was evidence of an employment by her, and of an acceptance by him of that employment. I am of opinion that the case was properly presented to the jury, and that they did right in finding the second issue for the plaintiff.

As to the form
of the declara-
tion.

VAUGHAN, J.—I am of the same opinion. The second issue involves the fact of the employment of the defendant, the duty arising out of that employment, and the party by whom the defendant was employed. By whom employed seems to me to be wholly immaterial. *Pippin v. Sheppard*, 11 Price, 400, is an authority directly in point: the facts of that case are very nearly the same as those in the present.

As to the form
of the declara-
tion.

BOSANQUET, J.—The question is whether the issue as to the employment of the defendant *by the plaintiff* was properly found for the plaintiff. The argument urged on the part of the defendant has proceeded upon the supposition that the case is to be governed by the same rules as are applicable to actions *ex contractu*. The action, however, is

not brought in respect of any contract, nor is it founded on contract. The defendant is charged with having misconducted himself in his profession of a surgeon and apothecary: and the plaintiff is the only person who could maintain the action for the personal consequences of such misconduct. The declaration alleges that the defendant was employed *by the plaintiff*; and that allegation is directly traversed by the second plea. It is unnecessary now to consider whether or not that was a material issue, or whether or not the case was a fit one for amendment under the statute: for, I think there was sufficient evidence of employment by the plaintiff. The defendant was called in, it seems, by the father. He therefore may possibly be liable to pay the defendant's bill (12). But the plaintiff submitted to the attendance; and that was a sufficient employment to sustain the issue.

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ERSKINE, J.—I am also of opinion that the verdict in this case has been properly found for the plaintiff on the second issue. The action is founded on a breach of duty: whether the duty the breach of which is charged exists or not, being a question of law to be inferred from the facts previously stated in the declaration, all such facts as are necessary to raise the duty must be alleged. It is not necessary, however, in such a case as this to state *by whom* the defendant was employed: it is enough to state generally that he was retained and employed—as in *Pippin v. Sheppard*. The second plea traverses the allegation of the employment, and the acceptance thereof by the defendant; that is substantially putting in issue those facts that were *necessarily* stated in the declaration for the purpose of raising the duty. Therefore, upon the record as it stands, I am of opinion that the verdict is right.—If an amendment

As to the form
of the declaration.

Amendment.

(12) Quære whether *any* person could be liable in respect of charges for attendances that were not only not beneficial, but that subjected the party giving them to an action for damages?

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day and year aforesaid, and signed by him the said Peter Sers, and attested and subscribed in the presence of the said Peter Sers by three credible witnesses, according to the form of the statute in such case made and provided; and thereby, amongst other things, gave and devised the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, unto W. Maples, in his life-time, now deceased, and John Brown, and their heirs, to hold to them, their heirs and assigns—to the use of his the said Peter Sers' son James Sers and his assigns for his life, without impeachment of waste, except as therein is excepted, with divers remainders over, and with power to his executors thereafter named, or the survivor of them, his executors or administrators, to raise any sum or sums of money by mortgage or charge of or on all or any part of his, the testator's, real estates, either in fee or for terms of years or otherwise as might be found most convenient; and for that and other the purposes in the said will mentioned, to convey and assure the same estates, or any part thereof, to any person or persons who should be willing to lend or advance any money on security of the same; and in which said will of the said Peter Sers there was and is also contained a certain proviso, that is to say, that it should and might be lawful to and for the person or persons who for the time being should be entitled to the rents or profits of all or any part of the said premises under the limitations thereinbefore contained, and to and for his the said Peter Sers' executors, and the survivor of them, his executors and administrators, from time to time, and at all times, during the minority of the person or persons so entitled, by indenture or indentures to be sealed and delivered by him or them respectively in the presence of one, two, or more credible witnesses, to limit and appoint by way of demise or lease all or any part or parts of the premises, with the appurtenances, to any person or persons, for any term or number

of years not exceeding twenty-one years, to take effect in possession, and not in reversion or by way of future interest, so as there should be reserved in every such limitation or appointment by way of demise or lease the best or most improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be limited or appointed, that could or might be reasonably had or gotten for the same, without taking any fine, premium, or foregift for making thereof, and so as there should be contained in every such indenture of limitation or appointment by way of demise or lease a covenant for re-entry for non-payment of the rent or rents to be thereby respectively reserved, for the space of twenty-one days after the same rents respectively should become due and payable, and so as the person or persons respectively to whom such limitation or appointment by way of demise or lease should be respectively made, should execute counterparts of the indenture or indentures to be made by him, her, or them respectively, and thereby covenant for the due payment of the rent or rents thereby respectively reserved, and so as the person or persons respectively to whom such limitation or appointment should be made, his or their executors, administrators, or assigns, should not by any clause or words to be contained in any such indenture or indentures be made dispensable for waste, or exempted from punishment for committing waste; and by his said will the said Peter Sers duly appointed the said W. Maples and John Brown executors thereof: and afterwards, to wit, on the 30th November, 1811, the said Peter Sers died so seised of the messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, without revoking or altering the said will as to the said demise of the said premises with the appurtenances; and afterwards, to wit, on the 30th November, in the year last aforesaid, the said W. Maples and John Brown duly proved the said last will and testament of the said Peter Sers, and took upon themselves the bur-

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Death of Peter
Sers, the testa-
tor.

Proof of the will.

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Death of W.
Maples, one of
the executors.

Lease to the
defendant.

Penalty.

then of the execution thereof: and afterwards, to wit, on the 19th June, 1812, the said W. Maples died, and the said John Brown then survived, and thereupon became and was and still is the surviving executor of the said last will and testament of the said Peter Sers deceased, and had execution thereof: that the said James Sers, then being entitled, under the limitations in the said last will and testament of the said Peter Sers contained, to the rents and profits of the premises thereafter mentioned to have been demised to the defendant, being part of the said premises in the said last will and testament mentioned, afterwards, and after the said James Sers had attained the full age of twenty-one years, to wit, on the 31st December, 1814, by a certain indenture then made between the said James Sers of the one part, and the defendant of the other part, &c., whereon such best and most improved yearly rent as aforesaid was and is reserved, without taking any fine, premium, or foregift, and containing such covenants as aforesaid—proffer—the said James Sers, for the considerations therein mentioned, by virtue and in exercise of the power and authority given to him in and by the said last will and testament of the said Peter Sers, and also by virtue and in exercise of all other powers and authorities enabling him in that behalf, did by way of demise or lease limit and appoint, and by way of further assurance demise and lease and to farm let unto the defendant, his executors, administrators, and assigns, the said messuage, &c., for twenty-one years from the 11th October then last past, at the yearly rent of 1500*l.*, payable quarterly: and also yielding and paying yearly and every year during the continuance of the said term thereby granted, unto the said James Sers and his assigns, and to the person or persons for the time being entitled as aforesaid, the further yearly rent or sum of 10*l.*, for every acre, and so in proportion for any less quantity than an acre, of all and every the said closes,

marshes, lands, grounds, and premises thereby appointed and demised, or intended so to be, which should at any time during the said term thereby granted be ploughed, dug, broken up, cut, converted, or managed contrary to the several covenants therein and hereinafter contained on the part of the defendant, or contrary to the true intent and meaning of the said indenture; which said several further or *substituted* yearly rent or rents and sums of money thereby or thereby intended to be reserved, were to be payable quarterly, in manner and at the several times therein and hereinbefore mentioned and appointed for the payment of the said first mentioned yearly rent; and the first quarterly payments of the said respective further yearly rents were to be made on such of the said days or times of payment therein and hereinbefore mentioned as should happen next after the same respective further rents should respectively be incurred; and the same respective further rents, or such of them as should respectively be incurred, were to continue payable thenceforth during all the residue of the said term thereby granted: covenant for payment of the reserved rents; and also that he, the defendant, his executors, administrators, or assigns, should not nor would at any time or times during the said term thereby granted, do, or cause or suffer to be done to the said premises thereby appointed and demised or intended so to be, or any part thereof, any waste or damage whatsoever, but should and would, during all the continuance of the said term, farm, cultivate, use, and manage all and singular the said premises thereby appointed and demised, or intended so to be, in a good and husbandlike manner—prout patet. The declaration then averred, that the defendant entered and continued possessed under the demise until the end of the term—that, on the 14th June, 1828, the surviving executor, John Brown, mortgaged the premises for one thousand years to the plaintiff—performance of covenants by the plaintiff—breach, that the defendant,

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after the making of the said several indentures of lease and mortgage respectively, and during the joint continuance of the several terms thereby respectively granted, and whilst the plaintiff was so entitled to the said immediate reversion of the said messuage, &c., to wit, on the said 14th June, 1828, aforesaid, and on divers other days and times between that day and the said 8th May, 1835 aforesaid, cultivated, used, and managed divers, to wit, two hundred acres of the said closes, &c., in and by the said first mentioned indenture appointed and demised to him the defendant as aforesaid, in a bad and unhusbandlike manner, contrary to the true intent and meaning of the said first-mentioned indenture, and of the covenant therein contained on the part of the defendant as aforesaid; whereby and according to the form and effect of the first-mentioned indenture, the defendant became liable to pay to the plaintiff yearly and every year during the said last-mentioned space of time, by even and equal quarterly payments on the several days and times whereon the said rent or sum of 1,500*l.* in the said indenture mentioned was and is so made payable as aforesaid, the further (14) yearly rent or sum of 2,000*l.*, being at and after the rate of 10*l.* for each of the said acres of the said closes, &c., by the said first-mentioned indenture appointed and demised, and by the defendant so cultivated, used, and managed in a bad and unhusbandlike manner as aforesaid; yet the defendant, although often requested so to do, had not paid to the plaintiff such further yearly rent as aforesaid, or any part thereof, but had wholly refused and neglected so to do, and there was then due and owing from the defendant to the plaintiff, for and on account of such further yearly rent which had accrued during the said last-mentioned space of time, a large sum of money, to wit, the sum of 9,000*l.*, for four years and a half of the said first-mentioned term of twenty-one years, ending on the 6th April, 1835, and then elapsed, contrary

(14) The words of the deed were, "further or *substituted*."

to the form and effect of the said first-mentioned indenture, and of the covenant of the defendant so by him in that behalf made as aforesaid; and so the plaintiff in fact said, &c. &c.

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The defendant pleaded—first, that Peter Sers did not devise in manner and form as the plaintiff had above alleged—secondly, that the indenture in the declaration firstly above mentioned was not his (the defendant's) deed—fifthly, that James Sers at the time of the making of the indenture in the declaration firstly above mentioned, was not entitled under the limitations contained in the will of Peter Sers to the rents and profits of the premises in the declaration mentioned to have been demised to the defendant in and by the said indenture therein firstly above mentioned in manner and form as the plaintiff had above alleged—sixthly, that the indenture in the declaration secondly mentioned was not the deed of James Sers and John Brown—seventhly, that he, the defendant, did, after the making of the indenture in the declaration firstly mentioned, and during the continuance of the term thereby granted, farm, cultivate, use, and manage all and singular the said premises thereby appointed and demised in a good and husbandlike manner, according to the tenor and effect, true intent, and meaning of the said covenant therein in that behalf contained. These pleas severally concluded to the country, and issues were joined thereon.

First plea.

Second plea.

Fifth plea.

Sixth plea.

Seventh plea.

There were other two pleas, to which there were replications and demurrers, upon which judgment was pronounced for the plaintiff in Trinity Term last—see 6 Scott, 502, 4 New Cases, 726.

The cause was tried before Lord Denman, C. J., at the last Lincoln Assizes. In order to prove the execution of the will by Peter Sers, one of the attesting witnesses was called. He said that he had no recollection whatever of having attested the will of Peter Sers: the attestation

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being shewn to him, he said the signature was like the character of his handwriting, but still his memory was not aided by it. He further stated that he had once been to the house of Peter Sers, upon certain business which he specified; but he thought that was in the Spring time. [The will was dated the 6th April, 1811, and the testator died on the 30th November following.] Another witness was called to prove the handwriting of the second attesting witness; he stated that he knew the handwriting of the party, and had heard that she was dead: on his cross-examination he admitted that he had received this information from the plaintiff in the cause. The third attesting witness was admitted to be dead.

It was objected, on the part of the defendant, that this was not sufficient proof of the will. But Lord Denman ruled that it was—giving the defendants leave to move for a nonsuit, if the court should differ from him in opinion.

There was ample proof of the breach of the covenant for good husbandry. On the part of the defendant, it was contended that the 10*l.* per acre reserved in the lease was in the nature of a penalty, and not liquidated damages. Lord Denman, however, thought otherwise; and a verdict was found for the plaintiff—damages, 1,500*l.*

As to the
 proof of the
 will of P. Sers.

Penalty or
 liquidated
 damages.

N. R. Clarke, in Easter Term last, accordingly moved for a nonsuit, or for a new trial, on the ground of misdirection, or in arrest of judgment.—The evidence was clearly insufficient to sustain the verdict for the plaintiff on the first issue: in fact there was no evidence to go to the jury.—The sum reserved by way of additional rent on the defendant's failure to cultivate the farm in a husband-like manner, was clearly a *penalty*. In *Lowe v. Peers*, 4 Burr. 2225, Lord Mansfield said: "There is a difference between covenants *in general*, and covenants *secured by a penalty or forfeiture*. In the latter case the obligee has

his election. He may either bring an action of debt for the penalty, and recover the *penalty* (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole), or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*. And upon this distinction they proceed in courts of equity. They will relieve against a *penalty*, upon a compensation: but, where the covenant is 'to pay a particular *liquidated* sum,' a court of equity cannot make a new covenant for a man; nor is there any room for compensation or relief. As, in leases containing a *covenant against ploughing up a meadow*; if the covenant be 'not to plough,' and there be a *penalty*, a court of equity will *relieve against the penalty*." Then, this is not a covenant to do or forbear to do a specific act. Nothing can be more vague than a covenant to manage a farm according to the rules of good husbandry. Manifest injustice must result from holding these payments to be liquidated and ascertained damages, without reference to any *actual* damage. The principle is thus laid down by Bayley, J., in *Davies v. Penton*, 6 B. & C. 216, 9 D. & R. 369—"I can well understand that parties might stipulate to pay each other a certain sum for the complete breach of the whole of an agreement, by way of liquidated damages; but, where the payment is to depend, as in this instance, not upon the breach of the whole, but upon *each and every part*, it appears to me that in some instances the amount fixed would be too little, and in others it would be abundantly too large. Where it is found that in the result in one case the sum to be paid would exceed, and in another would be quite inadequate to the injury received, the court is bound to hold that it never could have been intended that the sum was to be liquidated damages." [*Bosanquet, J.*—That looks very much like saying that there is no rule at all.] The principle es-

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 ment.

published in *Kemble v. Farren*, 3 M. & P. 425, 6 Bing. 141, is, that, where an agreement contains several stipulations of various degrees of value and importance, the sum declared payable on a breach of any one of them shall not be considered as stipulated damages, but merely as a penalty. (15)—As to the arrest of judgment. The lease was made by tenant for life under a power contained in the will of Peter Sers, which contains a proviso that the best rent that could be had should be reserved, and that “the person or persons respectively to whom such limitation or appointment should be made, his or their executors, administrators, or assigns, should not by any clause or words to be contained in any such indenture or indentures, be made dispunishable for waste, or exempted from punishment for committing waste.” The power does not authorize the introduction of such a covenant as that for the breach for which this action is brought—limiting, as it does, the responsibility of the tenant, by enabling him to do the acts specified, on payment of the 10*l.* per acre. Is it competent to a tenant for life to make a lease which will impose such a disadvantage on the reversioner? If it be, what was there to prevent him from stipulating for a mere nominal payment?

TINDAL, C. J.—I am of opinion that no sufficient ground has been laid for arresting the judgment. The lease in question purports to be made under a power which contains (amongst others) a proviso that the person or persons to whom any lease should be granted by virtue of the power should not be made dispunishable of waste. This lease does not appear by the record to be made dispunishable of waste: there is nothing in it to prevent the reversioner from suing for waste: it would be no answer to such action to shew that the covenant in question gives a

(15) See *Boys v. Ancell*, 6 Scott, 364, where the principal authorities upon this subject are cited and commented on.

cumulative remedy, in the affirmative. Upon the other two points the rule may go.

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M. D. Hill, Humfrey, and Gale, now shewed cause.—

1. Considering the will in question bore date twenty-eight years ago, and consequently would in two years more have proved itself (16), there was ample evidence to prove it. There was at least *some* evidence to go to the jury; and the defendant might have called upon the learned judge to put it to them. [*Tindal*, C. J.—I think the will was not proved. There certainly was *some* evidence to go to the jury; and it should have been left to them. Had it been shewn that the second witness was dead, that might have been enough. The mind of the first witness seems to have been a perfect blank upon the subject.—The rest of the court concurred].

2. The will being recited in the lease under which the defendant held, he is estopped by that recital from disputing the due execution of the will: the mere production of the lease, with proof of its execution by the defendant, establishes the will. At all events, if it cannot properly be put so high as an estoppel, it is evidence for the jury that the defendant has admitted the will, and enjoyed under it.

2. The recital of the will in the lease, an admission of its due execution.

3. The reservation of 10*l.* per acre made payable in the event of the defendant not cultivating the farm according to the rules of good husbandry, is not a *penalty*, it is a

3. The reservation not a *penalty*.

(16) See *M'Kenire v. Fraser*, 9 Ves. 5; *Lloyd v. Passingham*, 2 C. & P. 440; *Doe d. Oldham v. Wolley*, 8 B. & C. 22, nom. *Doe d. Oldnall v. Deakin*, 2 M. & R. 195, 3 C. & P. 402. The like rule applies to *deeds*—*Rex v. Farringdon*, 2 T. R. 471; *Marsh v. Collnett*, 2 Esp. 665; *Lygon v. Strutt*; 2

Anstr. 691; *Potts v. Durant*, 3 Anstr. 789; *Chettle v. Pound*, Bul. N. P. 255; *Roe d. Brune v. Rawlings*, 7 East, 291, 3 Smith, 254; *Swinerton v. The Marquis of Stafford*, 3 Taunt. 91; and also to *bonds*—*Chelsea Waterworks Co. v. Cowper*, 1 Esp. 275.

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rent; and this is the first time that the right of parties to agree for an increased rent under given circumstances has ever been doubted. In *Woodward v. Gyles*, 2 Vern. 119, where in a lease for years of land the lessee covenanted not to plough pasture land, and, if he did, then to pay after the rate of 20s. per annum for every acre ploughed; the court of Chancery refused to grant an injunction against the tenant's ploughing—the parties themselves having agreed the damage, and set a price for ploughing: and they declared that they would not relieve the lessee against the penalty if he ploughed. So in *Aylett v. Dodd*, 2 Atk. 238, it was held, that where there is a clause of nomine pœnæ in a lease to a tenant, to prevent his breaking up and ploughing old pasture land, in that case the whole nomine pœnæ shall be paid; for, the intention is, to give the landlord some compensation for the damage he has sustained from the nature of his land being altered. And this was treated in *Benson v. Gibson*, 3 Atk. 395, as a well-established doctrine. [*Tindal*, C. J., suggesting that this was a point deserving of a more solemn argument, it was agreed between the parties, that, in the event of the opinion of the court being in favour of the plaintiff upon the point, this should form the subject of a special case; the question of damages to be referred, if the 10l. per acre should ultimately be held to be a *penalty*].

Second point.

Balguy, *N. R. Clarke*, and *W. H. Watson*, in support of the rule, as to the second point.—The recital in the lease at the most amounts only to an admission of the fact that Peter Sers made a will, and that such will bears a given date, but not that the will contains a valid power of leasing. It clearly is not an estoppel; estoppels must be mutual. In *Abbott v. Plumbe*, Doug. 215, it was held, that, in an action on a bond, or to prove a petitioning creditor's debt which arises by bond, proof of the acknowledgment of the

obligor does not supersede the necessity of calling the subscribing witness.

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TINDAL, C. J.—The only question for our consideration on the present occasion, is, whether there was *any* evidence for the jury on the issue on non devisavit; the ground of the motion for a nonsuit being that there was *none*. It is true, as a general proposition, that the proper mode of proving a will in a court of law, is, by calling the attesting witnesses. But there are exceptions to this rule; one of which is, where the will is admitted for the purpose of the cause; another, where it is recited in a deed under the seal of the party, and some advantage is taken by him under it. That is this case. The will of Peter Sers, it is true, is not formally recited in the lease under which the defendant held; but the lease contains at least an admission that Peter Sers made a will on the 6th April, 1811, and that James Sers, the lessor, was entitled to the premises demised under the limitations contained in that will. At the trial a will was put in which upon the face of it appeared to be the will of this Peter Sers. It is now said that this sort of recital would let in *any* will. If there be anything in that objection, it should have been urged at the trial. No doubt was there entertained as to this being the will alluded to in the lease: and there was *some* evidence of its identity. I do not put the admission quite so high as an estoppel: I found my judgment upon the case of *Shelley v. Wright*, Willes, 9, where it was held that a party executing a deed is estopped by the recital of a particular fact in that deed to deny such fact: there, it was recited in the condition of a bond, that the obligor had received divers sums of money for the obligee which he had not brought to account, but acknowledged that a balance was due to the obligee; and it was holden that the obligor was estopped to say that he had not received any money for the use of the obligee. Here, the lease contains a direct reference to

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and assertion of the will. I think this was an excepted case, and that there was evidence to go to the jury.

VAUGHAN, J.—I am of the same opinion. Though the evidence of the attesting witness who was called was defective, yet upon the whole I think there was some evidence for the jury. The recital in the lease was clearly evidence against the defendant.

BOSANQUET, J.—I am also of opinion that there was sufficient evidence of the execution of the will in question, in the absence of evidence to contradict it. The witness's recollection was extremely loose and unsatisfactory. But the lease, under the hand and seal of the defendant, reciting the execution of a will corresponding in point of date with that produced at the trial, clearly was some evidence of the fact. That a recital of a former deed in an instrument under the hand and seal of a party is an admission of the recited deed, is clear: and I see no reason why the rule should not equally apply in the case of a will. In the absence of evidence to shew that it applied to any other will, it seems to me that there was abundant evidence to shew that the will produced was the one that was referred to in the lease; and therefore that the issue was properly found for the plaintiff.

ERSKINE, J.—Whether the will was proved or not was a question for the jury. If it had been intended to be urged that the will produced was not that which was recited or mentioned in the lease, the learned judge should have been asked to put it to the jury. There was a direct issue of *devisavit vel non*. There clearly was evidence whence the jury would have been warranted in inferring that it was the same will.

Rule discharged (17).

(17) No rule was drawn up, and prepared, the parties having agreed consequently no special case was to a compromise.

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Friday,
June 21st.

ASSUMPSIT.—The declaration stated, that, before and at the time of the making of the promises thereafter next mentioned, to wit, on the 1st January, 1838, one John Willerton had delivered to the plaintiff divers, to wit, *sixty-six* sheets of wool, of great value, to wit, of the value of 1000*l.*—*thirty-three* sheets thereof, of the value (to wit) of 500*l.*, to be by the plaintiff carried and conveyed by water from Boston, in the county of Lincoln, to Leeds, in the county of York, and there to be delivered by the plaintiff for the said John Willerton—and the remaining *thirty-three* sheets thereof, of the value (to wit) of 500*l.*, to be by the plaintiff carried and conveyed by water from Boston aforesaid to Bradford, in the county of York, and there to be delivered to Messrs. Hustler & Blackburn for the said John Willerton—for reward to the plaintiff in that behalf; and, in consideration of the premises respectively, the plaintiff had then promised the said John Willerton to carry and convey by water the first-mentioned thirty-three sheets of wool from Boston aforesaid to Leeds aforesaid, and the said second-mentioned thirty-three sheets of wool from Boston aforesaid to Bradford aforesaid, and to take proper and reasonable care of the same while the said sheets of wool respectively should be in his possession for the purposes aforesaid, and so to carry and convey the same respectively by water, and also to deliver the same respectively for the said John Willerton (that is to say) the said first-mentioned *thirty-three* sheets of wool at Leeds aforesaid, and the said second-mentioned *thirty-three* sheets of wool to the said Messrs. Hustler & Blackburn at Bradford aforesaid, within a reasonable time then next following; and the plaintiff then had the *sixty-six* sheets of wool for the purposes afore-

In an action against a carrier for negligence in the conveyance of goods by water, whereby they became wetted and spoiled, it appeared that the goods were put on board the defendant's boat under one entire contract for their conveyance from Boston to Leeds, one half to be delivered there, the other to be conveyed to and delivered at Bradford. At the trial, the plaintiff proved the contract and its execution by oral testimony; but, it appearing from the examination of one of his witnesses, that, at the time of the receipt of the goods by the defendant, two notes were delivered by him to the plaintiff (each applying to a moiety of the goods), which ascertained the destination of the goods, and the terms upon which they were to be carried, and only one of these being produced,

and the absence of the other not satisfactorily accounted for:—Held, that this was ground of non-suit.

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Friday,
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In an action against a carrier for negligence in the conveyance of goods by water, whereby they became wetted and spoiled, it appeared that the goods were put on board the defendant's boat under one entire contract for their conveyance from Boston to Leeds, one half to be delivered there, the other to be conveyed to and delivered at Bradford.

At the trial, the plaintiff proved the contract and its execution by oral testimony; but, it appearing from the evidence that at the time of the conveyance of the goods by the defendant, two were more delivered by a note to the plaintiff, the court held that the plaintiff was entitled to recover the value of the goods, and that the defendant was liable for the loss of the same.

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said : and thereupon, theretofore, to wit, on the day and year aforesaid, in consideration of the premises, and that the plaintiff had delivered to the defendant the said *sixty-six* sheets of wool for the purpose and in order that he might for and on the account and behalf of the plaintiff carry and convey the said first-mentioned *thirty-three* sheets thereof from Boston aforesaid to Leeds aforesaid, and there deliver the same for the said John Willerton, and the said second-mentioned *thirty-three* sheets thereof from Boston aforesaid to Leeds aforesaid in order that the same might be forwarded from thence to Bradford aforesaid, to be there delivered to the said Messrs. Hustler & Blackburn for the said John Willerton, for freight and reward to the defendant in that behalf, he the defendant then promised the plaintiff to carry and convey the said first-mentioned *thirty-three* sheets of wool from Boston aforesaid to Leeds aforesaid, and the said second-mentioned *thirty-three* sheets of wool from Boston aforesaid to Leeds aforesaid, in order that the same might be forwarded from thence to Bradford aforesaid, and to take proper and reasonable care of the same while the said sheets of wool respectively should be in his possession for the purposes aforesaid, and to carry and convey the same respectively, and also to deliver the same respectively for and on account and behalf of the plaintiff, for the said John Willerton, (that is to say) the said first-mentioned *thirty-three* sheets of wool at Leeds aforesaid, and the said second-mentioned *thirty-three* sheets of wool at Leeds aforesaid, in order that the same might be forwarded from thence to Bradford aforesaid, to be there delivered to the said Messrs. Hustler & Blackburn, for the said John Willerton as aforesaid, within a reasonable time then next following: and the plaintiff averred, that, although the defendant had the said *sixty-six* sheets of wool for the purposes aforesaid in his possession, yet the defendant, after the making of the said promise, disregarded the same, in this, that he the defendant did not nor would, after the

making of the said promise, and while the said wool was in his possession for the purposes aforesaid, take proper and reasonable care of the same, but, on the contrary thereof, after the making of the said promise, and while the said wool was in his possession for the purpose aforesaid, to wit, on the day and year aforesaid, took such little, improper, and bad care of the said wool, that by and through the want of proper and reasonable care of the defendant in that behalf, the said wool became and was greatly wetted, rotted, and damaged: and the plaintiff further said that the defendant further disregarded his duty in this, that he the defendant did not nor would carry and convey the said first-mentioned *thirty-three* sheets of wool from Boston aforesaid to Leeds aforesaid, and there, at Leeds aforesaid, deliver the same for and on the account and behalf of the plaintiff, or otherwise for the said John Willerton, within a reasonable time then next following, but, on the contrary thereof, delayed in so carrying, conveying, and delivering the same for much longer than a reasonable time in that behalf, to wit, one month longer, and did not deliver the same for and on the account and behalf of the plaintiff, or otherwise for the said John Willerton, at Leeds aforesaid, until long after, to wit, one month after a reasonable time in that behalf had elapsed: that the defendant further disregarded his said promise in this that he the defendant did not nor would carry and convey the said second-mentioned *thirty-three* sheets of wool from Boston aforesaid to Leeds aforesaid, in order that the same might be forwarded from thence to Bradford aforesaid, and there, at Bradford aforesaid, to be delivered for and on the account and behalf of the plaintiff, or otherwise to the said Messrs. Hustler & Blackburn for the said John Willerton, within a reasonable time then next following, but, on the contrary thereof, delayed in so carrying, conveying, and delivering the same for much longer than a reasonable time in that behalf, to wit, one month longer, and did not carry or convey the

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same from Boston aforesaid to Leeds aforesaid for and on the account and behalf of the plaintiff, or otherwise, until long after, to wit, one month after a reasonable time in that behalf had elapsed: By reason whereof the said *sixty-six* sheets of wool were greatly deteriorated in value, and the said J. Willerton was forced and obliged to and necessarily did pay, lay out, and expend divers large sums, amounting (to wit) to 40*l.*, in and about the drying of the said wool, and endeavouring to remedy the said damage so occasioned as aforesaid, and was also prevented from selling the said wool for a long time, to wit, for the space of six weeks, during which time he might and would otherwise have sold the said wool, to wit, six weeks next after the expiration of a reasonable time for delivering the said wool respectively; and whereby the said John Willerton lost and was deprived of divers large gains and profits, to wit, 500*l.*, which would otherwise have accrued to the said John Willerton from selling the said wool, during the time when he was so prevented from selling the same as aforesaid, the price to be obtained for the said wool having become much less at the end of the said time than the price which might and could have been obtained for the same at the beginning of and during the said time; and thereupon the said John Willerton, for the recovery of the damages by him sustained as aforesaid, on the 21st July, 1837, commenced his action on promises against the now plaintiff, and declared thereon for the recovery of such damages by reason of the plaintiff's breach of his said promise so made to the said John Willerton as aforesaid, the same having been so occasioned by the defendant's said breach of his said promise to the plaintiff as aforesaid; and the plaintiff afterwards, to wit, on the 18th December, 1837, gave the defendant notice of the said action, and required the defendant to indemnify him therefrom, which he wholly neglected and refused to do; and thereupon the plaintiff, in order to put an end to the said action, and prevent further damage and loss and costs

therein, was forced and obliged, and did afterwards, to wit, on the day and year last aforesaid, compromise and settle and arrange the same with the said John Willerton, by then paying and satisfying to him the sum of 60*l.* 7*s.* for his damages which he had sustained by reason of the premises, and for his costs and charges by him about his suit in that behalf expended: and by means of the premises the plaintiff was put to and incurred, and was obliged to pay, lay out, and expend divers sums, amounting (to wit) to 50*l.*, in and about the appearing to and defending the said action, and in and about the said compromising, settling, and arranging the same, and in and about procuring the evidence and testimony of witnesses in respect to the said damages so done as aforesaid, and in ascertaining the nature and amount thereof; and the plaintiff had been and was by means of the premises otherwise much injured and damaged &c.

The defendant pleaded that he did not promise in manner and form as the plaintiff had above thereof complained against him.

The cause was tried before Lord Denman, C. J., at the last Spring Assizes at Lincoln. The facts were as follow: One John Willerton, the owner of the wools mentioned in the declaration, employed the plaintiff, a carrier at Boston, to convey them as stated in the declaration, one half to Leeds, the other half to Bradford. The plaintiff employed the defendant to perform the contract for him; and the wool was accordingly carried by the defendant, and delivered at its respective places of destination after much delay, and considerably damaged. Willerton brought an action against the plaintiff, who was compelled to pay 60*l.* 7*s.* for damages and costs. The plaintiff having proved by oral testimony the delivery of the wool on board the defendant's boat, and the delivery of the respective parcels at their destination, the bill of lading or freight-note was called for on the part of the defendant. A clerk of the plaintiff was thereupon put into the witness-box. He produced a paper,

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COLTMAN, J.—I yield to this objection with extreme reluctance. The rules of law, however, must not be made to bend to meet the justice of the particular case. At the trial a paper was produced containing the terms upon which a moiety of the goods was delivered to the plaintiff; and it was proved that *the usual note* was delivered with the other moiety: I therefore think we must infer from the paper that was produced what were the contents of that which was not produced, the two having been delivered at the same time. The paper being delivered at the time the goods were delivered, and confessedly containing directions as to what was to be done with them, it clearly was the proper evidence of the contract. It not having been produced, nor its absence sufficiently accounted for or excused, it follows that the plaintiff should have been nonsuited.

ERSKINE, J.—I am of the same opinion. The contract the breach of which the plaintiff complains of in his declaration, is a contract for the conveyance of the entire quantity of wool to Leeds, one moiety to be delivered there, and the other moiety to be conveyed to and delivered at Bradford: and the only question is, whether or not the evidence offered on the part of the plaintiff made out this contract. Had it not appeared that the terms of the contract had been reduced into writing, there clearly was evidence enough to sustain the plaintiff's case. One witness, however, proved that a note containing the terms of the contract was delivered by Scholey the defendant's boatman to the plaintiff at the time the wools were put on board. Upon its being produced, this note was found to apply to one half of the wools only. Another witness proved that the *usual note* was delivered with the other half. This was not produced. Then, inasmuch as the paper that was produced contained the terms of the contract for the carriage of the first parcel, the fair inference from the evidence is, that the paper which was not produced likewise contained the terms

of the contract as to the other parcel. The non-production of it was clearly a ground of nonsuit, the consideration for the carriage being entire. The plaintiff could not give secondary evidence of the absent note, without shewing that proper search had ineffectually been made for it. This I think he failed to do.

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Rule absolute.

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Saturday,
June 22nd.

THIS was an action of ejectment brought by the lessors of the plaintiff, the trustees of a society of Wesleyan methodists, to recover from the defendant, who claimed as heir-at-law, the possession of a house and about twenty-three acres of land. The cause was tried before Coleridge, J., at the last Spring Assizes at Radnor. The facts were as follow:—The property in question had belonged to the Rev. Joseph Lloyd, an aged clergyman of the Established Church, who was very much under the influence of certain ministers of the Wesleyan society. The lessors of the plaintiff claimed under deeds of lease and release bearing date the 3rd and 4th July, 1836, purporting to be a conveyance of the property to them in consideration of the sum of 490*l.*, upon certain trusts contained in a deed called the model deed, dated in 1832, which contained no declaration of uses applicable to land.

The deed appeared to have been executed in the presence of two witnesses, and purported to have been inrolled in Chancery within two months after its execution. Indorsed thereon was a receipt for 490*l.* in the usual form; and it was proved that the money passed. It appeared on cross-ex-

An aged clergyman of the Established Church, under the influence of certain ministers of the Wesleyan Society, two years before his death conveyed to trustees for that society the house he resided in and about twenty-three acres of land, for the sum of 490*l.* It was proved that this sum passed from the grantee to the grantor at the time the conveyance was executed; but it also appeared that shortly afterwards the same parties obtained from him a sum of 500*l.*, and that the grantor continued to

reside on the premises until his death. The validity of this grant was contested by the heir-at-law of the grantor, in an action of ejectment brought against him for the recovery of the property, on the ground of the suspicious character of the transaction, which he contended to be a fraud upon the statute of charitable uses, 9 Geo. 2, c. 36. At the trial, the judge withdrew from the jury the question of fraud; holding that it was not competent to the heir-at-law to question the validity of the deed of his ancestor:—Held, that this was a misdirection.

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amination of the plaintiff's witnesses (none were called on the part of the defendant), that Dr. Buntin, one of the Wesleyan party, shortly after the execution of the deed, obtained from the grantor 500*l.*; that the grantor at the time of the execution was upwards of eighty-four years of age, and had lately had a severe fall, which had very much impaired his health; that his intellect was nearly gone; and that he continued to occupy the premises until the time of his death, a period of nearly two years.

On the part of the defendant, it was contended that the conveyance was a fraud upon the statute 9 Geo. 2, c. 36 (20),

(20) The first section of this statute recites, that "gifts or alienations of lands, tenements, or hereditaments in *mortmain* are prohibited or restrained by Magna Charta and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called *charitable uses*, to take place after their deaths, to the disherison of their lawful heirs;" and for remedy thereof enacts "that no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons,

bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds), be and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of execution and death), and be inrolled in his majesty's High Court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in *possession* for the charitable use intended, *immedi-*

and that the grantor, though not absolutely insane at the time of the conveyance, was yet in so infirm a condition of mind as to be incapable of making a valid deed.

On the other hand, it was insisted that the transaction, even though not capable of being supported as a transfer for a valuable consideration, under the 2nd section of the 9 Geo. 2, c. 36 (21), was good as a gift, under the 1st section, the grantor having survived the grant more than a year, and all the requisites of the act having been complied with. And further, it was contended, on the authority of *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367, that the grantor and all claiming under him were estopped from disputing the validity of his deed.

Yielding to this latter objection, the learned judge told the jury, that, as Lloyd himself could not have been permitted to question the validity of his own deed, so neither

ately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."

And s. 3 enacts "that all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses

whatsoever, which shall at any time be made in any other manner or form than by this act is directed and appointed, shall be absolutely and to all intents and purposes null and void."

(21) Which provides "that nothing thereinbefore mentioned relating to the sealing and delivering of any deed or deeds twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend or be construed to extend to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really and bona fide for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion."

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and assertion of the will. I think this was an excepted case, and that there was evidence to go to the jury.

VAUGHAN, J.—I am of the same opinion. Though the evidence of the attesting witness who was called was defective, yet upon the whole I think there was some evidence for the jury. The recital in the lease was clearly evidence against the defendant.

BOSANQUET, J.—I am also of opinion that there was sufficient evidence of the execution of the will in question, in the absence of evidence to contradict it. The witness's recollection was extremely loose and unsatisfactory. But the lease, under the hand and seal of the defendant, reciting the execution of a will corresponding in point of date with that produced at the trial, clearly was some evidence of the fact. That a recital of a former deed in an instrument under the hand and seal of a party is an admission of the recited deed, is clear: and I see no reason why the rule should not equally apply in the case of a will. In the absence of evidence to shew that it applied to any other will, it seems to me that there was abundant evidence to shew that the will produced was the one that was referred to in the lease; and therefore that the issue was properly found for the plaintiff.

ERSKINE, J.—Whether the will was proved or not was a question for the jury. If it had been intended to be urged that the will produced was not that which was recited or mentioned in the lease, the learned judge should have been asked to put it to the jury. There was a direct issue of *devisavit vel non*. There clearly was evidence whence the jury would have been warranted in inferring that it was the same will.

Rule discharged (17).

(17) No rule was drawn up, and prepared, the parties having agreed consequently no special case was to a compromise.

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THOMPSON v. TRAVIS.

Friday,
June 21st.

ASSUMPSIT.—The declaration stated, that, before and at the time of the making of the promises thereafter next mentioned, to wit, on the 1st January, 1838, one John Willerton had delivered to the plaintiff divers, to wit, *sixty six* sheets of wool, of great value, to wit, of the value of 1000*l.*—*thirty-three* sheets thereof, of the value (to wit) of 500*l.*, to be by the plaintiff carried and conveyed by water from Boston, in the county of Lincoln, to Leeds, in the county of York, and there to be delivered by the plaintiff for the said John Willerton—and the remaining *thirty-three* sheets thereof, of the value (to wit) of 500*l.*, to be by the plaintiff carried and conveyed by water from Boston aforesaid to Bradford, in the county of York, and there to be delivered to Messrs. Hustler & Blackburn for the said John Willerton—for reward to the plaintiff in that behalf; and, in consideration of the premises respectively, the plaintiff had then promised the said John Willerton to carry and convey by water the first-mentioned thirty-three sheets of wool from Boston aforesaid to Leeds aforesaid, and the said second-mentioned thirty-three sheets of wool from Boston aforesaid to Bradford aforesaid, and to take proper and reasonable care of the same while the said sheets of wool respectively should be in his possession for the purposes aforesaid, and so to carry and convey the same respectively by water, and also to deliver the same respectively for the said John Willerton (that is to say) the said first-mentioned *thirty-three* sheets of wool at Leeds aforesaid, and the said second-mentioned *thirty-three* sheets of wool to the said Messrs. Hustler & Blackburn at Bradford aforesaid, within a reasonable time then next following; and the plaintiff then had the *sixty-six* sheets of wool for the purposes afore-

In an action against a carrier for negligence in the conveyance of goods by water, whereby they became wetted and spoiled, it appeared that the goods were put on board the defendant's boat under one entire contract for their conveyance from Boston to Leeds, one half to be delivered there, the other to be conveyed to and delivered at Bradford.

At the trial, the plaintiff proved the contract and its execution by oral testimony; but, it appearing from the examination of one of his witnesses, that, at the time of the receipt of the goods by the defendant, two notes were delivered by him to the plaintiff (each applying to a moiety of the goods), which ascertained the destination of the goods, and the terms upon which they were to be carried, and only one of these being produced,

and the absence of the other not satisfactorily accounted for:—Held, that this was ground of non-suit.

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said: and thereupon, theretofore, to wit, on the day and year aforesaid, in consideration of the premises, and that the plaintiff had delivered to the defendant the said *sixty-six* sheets of wool for the purpose and in order that he might for and on the account and behalf of the plaintiff carry and convey the said first-mentioned *thirty-three* sheets thereof from Boston aforesaid to Leeds aforesaid, and there deliver the same for the said John Willerton, and the said second-mentioned *thirty-three* sheets thereof from Boston aforesaid to Leeds aforesaid in order that the same might be forwarded from thence to Bradford aforesaid, to be there delivered to the said Messrs. Hustler & Blackburn for the said John Willerton, for freight and reward to the defendant in that behalf, he the defendant then promised the plaintiff to carry and convey the said first-mentioned *thirty-three* sheets of wool from Boston aforesaid to Leeds aforesaid, and the said second-mentioned *thirty-three* sheets of wool from Boston aforesaid to Leeds aforesaid, in order that the same might be forwarded from thence to Bradford aforesaid, and to take proper and reasonable care of the same while the said sheets of wool respectively should be in his possession for the purposes aforesaid, and to carry and convey the same respectively, and also to deliver the same respectively for and on account and behalf of the plaintiff, for the said John Willerton, (that is to say) the said first-mentioned *thirty-three* sheets of wool at Leeds aforesaid, and the said second-mentioned *thirty-three* sheets of wool at Leeds aforesaid, in order that the same might be forwarded from thence to Bradford aforesaid, to be there delivered to the said Messrs. Hustler & Blackburn, for the said John Willerton as aforesaid, within a reasonable time then next following: and the plaintiff averred, that, although the defendant had the said *sixty-six* sheets of wool for the purposes aforesaid in his possession, yet the defendant, after the making of the said promise, disregarded the same, in this, that he the defendant did not nor would, after the

making of the said promise, and while the said wool was in his possession for the purposes aforesaid, take proper and reasonable care of the same, but, on the contrary thereof, after the making of the said promise, and while the said wool was in his possession for the purpose aforesaid, to wit, on the day and year aforesaid, took such little, improper, and bad care of the said wool, that by and through the want of proper and reasonable care of the defendant in that behalf, the said wool became and was greatly wetted, rotted, and damaged: and the plaintiff further said that the defendant further disregarded his duty in this, that he the defendant did not nor would carry and convey the said first-mentioned *thirty-three* sheets of wool from Boston aforesaid to Leeds aforesaid, and there, at Leeds aforesaid, deliver the same for and on the account and behalf of the plaintiff, or otherwise for the said John Willerton, within a reasonable time then next following, but, on the contrary thereof, delayed in so carrying, conveying, and delivering the same for much longer than a reasonable time in that behalf, to wit, one month longer, and did not deliver the same for and on the account and behalf of the plaintiff, or otherwise for the said John Willerton, at Leeds aforesaid, until long after, to wit, one month after a reasonable time in that behalf had elapsed: that the defendant further disregarded his said promise in this that he the defendant did not nor would carry and convey the said second-mentioned *thirty-three* sheets of wool from Boston aforesaid to Leeds aforesaid, in order that the same might be forwarded from thence to Bradford aforesaid, and there, at Bradford aforesaid, to be delivered for and on the account and behalf of the plaintiff, or otherwise to the said Messrs. Hustler & Blackburn for the said John Willerton, within a reasonable time then next following, but, on the contrary thereof, delayed in so carrying, conveying, and delivering the same for much longer than a reasonable time in that behalf, to wit, one month longer, and did not carry or convey the

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same from Boston aforesaid to Leeds aforesaid for and on the account and behalf of the plaintiff, or otherwise, until long after, to wit, one month after a reasonable time in that behalf had elapsed: By reason whereof the said *sixty-six* sheets of wool were greatly deteriorated in value, and the said J. Willerton was forced and obliged to and necessarily did pay, lay out, and expend divers large sums, amounting (to wit) to 40*l.*, in and about the drying of the said wool, and endeavouring to remedy the said damage so occasioned as aforesaid, and was also prevented from selling the said wool for a long time, to wit, for the space of six weeks, during which time he might and would otherwise have sold the said wool, to wit, six weeks next after the expiration of a reasonable time for delivering the said wool respectively; and whereby the said John Willerton lost and was deprived of divers large gains and profits, to wit, 500*l.*, which would otherwise have accrued to the said John Willerton from selling the said wool, during the time when he was so prevented from selling the same as aforesaid, the price to be obtained for the said wool having become much less at the end of the said time than the price which might and could have been obtained for the same at the beginning of and during the said time; and thereupon the said John Willerton, for the recovery of the damages by him sustained as aforesaid, on the 21st July, 1837, commenced his action on promises against the now plaintiff, and declared thereon for the recovery of such damages by reason of the plaintiff's breach of his said promise so made to the said John Willerton as aforesaid, the same having been so occasioned by the defendant's said breach of his said promise to the plaintiff as aforesaid; and the plaintiff afterwards, to wit, on the 18th December, 1837, gave the defendant notice of the said action, and required the defendant to indemnify him therefrom, which he wholly neglected and refused to do; and thereupon the plaintiff, in order to put an end to the said action, and prevent further damage and loss and costs

therein, was forced and obliged, and did afterwards, to wit, on the day and year last aforesaid, compromise and settle and arrange the same with the said John Willerton, by then paying and satisfying to him the sum of 60*l.* 7*s.* for his damages which he had sustained by reason of the premises, and for his costs and charges by him about his suit in that behalf expended: and by means of the premises the plaintiff was put to and incurred, and was obliged to pay, lay out, and expend divers sums, amounting (to wit) to 50*l.*, in and about the appearing to and defending the said action, and in and about the said compromising, settling, and arranging the same, and in and about procuring the evidence and testimony of witnesses in respect to the said damages so done as aforesaid, and in ascertaining the nature and amount thereof; and the plaintiff had been and was by means of the premises otherwise much injured and damnified &c.

The defendant pleaded that he did not promise in manner and form as the plaintiff had above thereof complained against him.

The cause was tried before Lord Denman, C. J., at the last Spring Assizes at Lincoln. The facts were as follow: One John Willerton, the owner of the wools mentioned in the declaration, employed the plaintiff, a carrier at Boston, to convey them as stated in the declaration, one half to Leeds, the other half to Bradford. The plaintiff employed the defendant to perform the contract for him; and the wool was accordingly carried by the defendant, and delivered at its respective places of destination after much delay, and considerably damaged. Willerton brought an action against the plaintiff, who was compelled to pay 60*l.* 7*s.* for damages and costs. The plaintiff having proved by oral testimony the delivery of the wool on board the defendant's boat, and the delivery of the respective parcels at their destination, the bill of lading or freight-note was called for on the part of the defendant. A clerk of the plaintiff was thereupon put into the witness-box. He produced a paper,

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making it in a competent state to execute a deed. The first of these questions he withdrew from the jury, on the authority of *Doe d. Roberts v. Roberts*, on the ground that the defendant, claiming under the grantor, was estopped from disputing the validity of his deed. The object the legislature had in view in passing the statute upon which the question arises, is apparent from the recital, which states that "gifts or alienations of lands, tenements, or hereditaments, in mortmain, were prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public mischief had of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called *Charitable Uses* to take place after their deaths, to the disherison of their lawful heirs." One object of the legislature therefore clearly was to protect the heir against the improvident alienation of his ancestor. In the present case it was alleged on the part of the defendant that the conveyance, though made more than twelve months before the death of the grantor, was made with a view to evade the statute. If it were shewn that the object of the parties was, to give the transaction the appearance of a sale for a money consideration, in order to elude the provisions of the statute, it appears to me that the conveyance would be invalid, and that the defendant was not precluded by any rule of law from setting up such invalidity. The question is whether there was *any* evidence upon the subject; for, if there was any, however slight, the learned judge was wrong in saying that the heir (who is the very person the statute intended to protect) was estopped from contesting the validity of the grant. Upon reading the report, I cannot come to the conclusion that there was no evidence: and therefore I think there must be a new trial. It would not be proper to enter very particularly into the circumstances of the case: but I cannot help saying that the language of the deed itself

is calculated to excite suspicion; it is evident that the statute (which it was quite unnecessary to advert to if the transaction was *bonâ fide*) was in the contemplation of the person who framed it. And the fact of the sum of 500*l.* (about the amount of the supposed purchase money, and the expences of the conveyance) having been given by Mr. Lloyd to one of the body to whom the conveyance was made, materially strengthens that suspicion. There clearly was some evidence that ought to have been submitted to the jury: and therefore the rule for a new trial must be made absolute.

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COLTMAN, J.—The learned judge was evidently misled by an imperfect recollection of *Doe d. Roberts v. Roberts*. That case clearly does not bear out the position for which it was cited, viz. that the heir-at-law is estopped from asserting the invalidity of the deed of his ancestor by virtue of the statute of charitable uses. The act would be entirely defeated if it were so. On shewing cause against the rule, the counsel for the lessors of the plaintiff very properly abandoned that point: but they contended that there was no evidence to go to the jury as to the deed being fraudulent and collusive. Without expressing any opinion upon the value of the evidence, I must say I think there was *some* evidence upon which the opinion of the jury should have been taken, and which having been withdrawn from them, the defendant is entitled to have a new trial. Notwithstanding the grantor lived more than twelve months after the making of the conveyance, if the object of the parties was to give the transaction the appearance of a sale for a valuable consideration, with a private understanding that the money should be returned, it would be a fraud upon the statute to permit the deed to be operative. Whether or not there was such private understanding, must depend upon the opinion formed by the jury upon the evidence submitted to them.

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ERSKINE, J.—I agree, that, if the transaction was collusive and colourable, for the purpose of evading the statute, the deed would be void, though the grantor lived more than twelve months after the making of the conveyance. And I am also of opinion that it was competent to the heir to dispute the validity of the deed. The only difficulty I feel, is, in discovering that there was any evidence for the jury. But, inasmuch as my learned Brothers think there was *some* evidence, the rule for a new trial must be made absolute.

Rule absolute (23).

(23) Upon the second trial, before Gurney, B., at the Radnor Summer Assizes, 1839, the defendant again abstained from producing any witnesses, but relied on the absence of evidence on the part of the lessors of the plaintiff to remove the suspicion, the existence of which had induced the court to send the cause down again. The learned Baron told the jury that they must decide the case upon the evidence presented to them, and not upon mere suggestions of suspicion. The jury again found for the lessors of the plaintiff.

In Michaelmas Term, *Williams* obtained a rule nisi for a third trial, on three grounds—first, that there was no sufficient evidence of the enrolment of the deed pursuant to the 9 Geo. 2, c. 36, s. 1—secondly, that the deed was not made to take effect “in possession for the charitable use intended, immediately from the making thereof,” and contained no declaration of uses—thirdly, that the model deed, to which the bargain and sale referred, contained no declaration of uses applicable to *land*.

END OF THE SITTINGS.

IN THE HOUSE OF LORDS.

2 & 3 VICTORIÆ.

THE JUDGES PRESENT WERE—TINDAL, C. J., VAUGHAN, J., PARKE, B.
BOSANQUET, J., PATTESON, J., GURNEY, B., WILLIAMS, J.,
COLERIDGE, J., ERSKINE, J., AND MAULE, B.

BIGNOLD and Another, Appellants,
SPRINGFIELD and Others, Respondents.

1839.

*Tuesday,
June 25th.*

AT the time of passing the statute 5 & 6 Will. 4, c. 76, intituled 'An act to provide for the regulation of Municipal Corporations in England and Wales,' the corporate body of the city of Norwich, or some members of the said body corporate, in their corporate capacity, stood solely or together with certain persons or person elected solely by such body corporate, or solely by some particular number, class, or description of members of such body corporate, seised or possessed for some estate or interest in various hereditaments, sums of money, chattels, securities for money, and other personal estate, producing an annual income of about 8,000*l.*, in trust or for the benefit of various charitable uses or trusts.

The administration of the charity estates and funds comprised in and described by the 5 & 6 Will. 4, c. 76, s. 71, did not continue, after the 1st August, 1836, in the persons described in that section, though no subsequent act passed respecting the same, and no vacancy had been occasioned amongst such persons, before that time.

The 71st section of the statute—reciting that "divers bodies corporate now stand seised or possessed of sundry hereditaments and personal estate, in trust, in whole or in

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 c. 76, s. 71.

part, for certain charitable trusts, and it is expedient that the administration thereof be kept distinct from that of the public stock and borough fund"—enacts "that, in every borough in which the body corporate, or any one or more of the members of such body corporate, in his or their corporate capacity, now stands or stand solely or together with any person or persons elected solely by such body corporate, or solely by any particular number, class, or description of members of such body corporate, seised or possessed for any estate or interest whatsoever of any hereditaments, or any sums of money, chattels, securities for money, or any other personal estate whatsoever, in whole or in part, in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, shall continue in the persons who at the time of the passing of this act are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office by virtue of which before the passing of this act they were such trustees, until the 1st August, 1836, or until parliament shall otherwise order, and shall immediately thereupon utterly cease and determine: Provided always, that, if any vacancy shall be occasioned among the charitable trustees for any borough before the said 1st August, it shall be lawful for the Lord High Chancellor, or Lords Commissioners of the Great Seal, for the time being, upon petition, in a summary way, to appoint another trustee to supply such vacancy; and every person so appointed a trustee as last aforesaid shall be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he shall then cease to be a trustee: Provided also, that, if parliament shall not otherwise direct, on or before the said 1st August, 1836, the Lord High Chancellor or Lord Commissioners of the Great Seal shall make such orders as he or they shall see fit for

the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates."

On the 16th August, 1836, the appellants presented their petition to the Lord Chancellor, by their description of two of the inhabitants of the city of Norwich, and also two of the persons who at the time of the passing of the said act of parliament were members of the body corporate called the mayor, sheriffs, citizens, and commonalty of the city of Norwich, on behalf of themselves and all other the persons who at the time of the passing of the said act were members of and constituted such body corporate.

This petition was intituled—"In Chancery. In the matter of the Charitable Estates and Funds heretofore vested in the mayor, sheriffs, citizens, and commonalty of the city of Norwich, as trustees for Charitable Purposes;" and was signed by the said appellants in the presence of W. M. Kitton, their solicitor, and was first duly certified and allowed by his Majesty's Attorney-General under the provisions of the statute 52 Geo. 3, c. 101: and, after stating as therein was stated, prayed that it might be declared, that, according to the true construction of the said act of parliament, all the said charity estates, funds, and properties did then remain and continue vested in the said petitioners and the other of the eighty-three surviving persons therein named, or in such of them as were or might be living at the time of making the order to be thereupon made, upon the uses and trusts and for the purposes to which, at the time of the passing of the said act of the 5 & 6 Will. 4, the same were applicable as aforesaid; and that they the said petitioners and the said other persons might be at liberty and might be authorized to administer and apply the same, and the rents, interests, dividends, and annual profits thereof, upon and for such uses, trusts, and purposes, in like manner as the same had been theretofore applied; or, in case it should appear to the court that such was not the true construction of the said act, then that they

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the said petitioners and such other persons as aforesaid might be appointed trustees for the purposes aforesaid, or otherwise that it might be referred to the Master of the vacation to appoint proper persons to be such trustees, with liberty for them the said petitioners and the said other persons to propose themselves as such trustees, and that, in the mean time, the said petitioners and the said other persons might be at liberty to act in the administration of the said estates, funds, rents, and income thereof, and that all proper directions might be given for effectuating the aforesaid purposes, and for duly administering the said estates and premises, and that the costs of and incident to the said application might be paid out of the said trust estates; or that his lordship would make such further or other order as to his lordship should seem meet."

Respondents'
 petition.

On the 19th August, 1836, the respondents presented their petition to the Lord Chancellor, which was intituled—"In Chancery. In the matter of the Charities in the borough and city of Norwich, called respectively the Great Hospital, Doughty's Hospital, the Boys' Hospital, the Girls' Hospital, the Barnham Broom Estate, Luke Fisher's Charity, Elizabeth Pendleton's Charity, the Rev. Edward Warne's Charity, Alderman Bickerdike's Charity, Justice Mann's Charity, Sir Peter Leaman's Charity, Thomas Vere's Charity, Alderman Augustine Briggs's Charity, Alderman Robert Craske's Charity, the Preachers' Money, the Smithfield Money, Sir Thomas White's Money, the Rev. John Vaughan's Money, Alderman John Mann's Money, William Doughty's Money, Joseph Loveland's Money, Roger Crowe's Money, Alderman Thomas Pettus's Money, Thomas Doughty's Money, Alderman Augustus Scottow's Money, Nathaniel Cox's Money, Mrs. Anne Craske's Money, and Alderman Edward Nutting's Money: And in the matter of an act of parliament made and passed in the Fifth and Sixth years of his late Majesty King George the Third, intituled, 'An act to provide a summary remedy

in cases of abuses of trusts created for charitable purposes :¹ And in the matter of an act of parliament made and passed in the Fifth and Sixth years of the reign of his present Majesty, King William the Fourth, intituled, ' An act to provide for the regulation of Municipal Corporations in England and Wales : ' And, after stating as therein was stated, the said petition prayed that it might be referred to one of the Masters of the said court to approve of some proper persons to be appointed trustees of the said charities ; or that his lordship would make such other order for the administration of such trust-estates as to his lordship might seem just and fit."

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Affidavits were filed in support of the said petitions of the appellants and respondents, and the two petitions came on to be heard together before the Lord Chancellor, who was pleased to order that it should be referred to the Master of the court in attendance during the vacation, to appoint proper persons to be trustees of and for the charity estates and property then late vested in or under the administration of the corporation of Norwich, or any of the members thereof in that character, which were affected by the 71st section of the 5 & 6 Will. 4, c. 76 ; and that all deeds, books, papers, and writings in the custody or power of the parties relating to the said charity estates and property, should be produced before the said Master upon oath as he should direct ; and that he was to be at liberty to state any special circumstances, as he should think fit : and his lordship reserved the consideration of all further directions, and of the costs of the said applications ; and any of the parties were to be at liberty to apply to the court as there should be occasion.

Reference to
the Master.

On the 14th February, 1837, the appellants presented their petition of appeal to the House of Lords. On the 22nd March, 1837, the respondents presented their petition to the House of Lords, submitting that the said order of the Lord Chancellor was final and conclusive, and that no

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appeal lay therefrom, and praying that the said petition of appeal might be dismissed with costs, or that the benefit of the objection to the said appeal might be reserved to the respondents on the hearing of the present appeal.

The case was argued by *Knight Bruce* and *Jacob* for the appellants, and by the *Attorney-General* and *Pemberton* for the respondents.

Question.

The opinion of the judges was requested—Whether the administration of the charity estates and funds comprised in and described by the 71st section of the 5 & 6 Will. 4, c. 76, continued after the 1st August, 1836, in the persons described in the said 71st section, no subsequent act having passed respecting the same before the 1st August, 1836, and no vacancy having been occasioned amongst such persons before that time.

After time taken for deliberation, the opinion of the judges was now delivered by—

TINDAL, C. J.—My Lords—In answer to the question proposed by your lordships to her Majesty's judges, viz. whether the administration of the charity estates and funds comprised in and described by the 71st section of the 5 & 6 Will. 4, c. 76, continued after the 1st August, 1836, in the persons described in the said 71st section, no subsequent act having passed respecting the same before the 1st August, 1836, and no vacancy having been occasioned amongst such persons before that time—I have the honor of stating our opinion to be, that the administration of the charity estates and funds referred to in the question did not continue after the 1st August, 1836, in the persons described in the 71st section of the act. It was admitted by the counsel for the appellants in the course of the argument, and very properly admitted, that it is impossible to

put any construction on the whole of the clause, without meeting with much difficulty. But we think ourselves bound to put that interpretation upon it which, taking the whole of it together, appears to do the least violence to the words employed in it, and at the same time to give a consistent meaning to every part of the section. And, keeping this object in view, we think the words in the 71st section, that the powers of the former trustees shall continue "until the 1st August, 1836, or until parliament shall otherwise order, and shall immediately thereupon utterly cease and determine," are to be construed as if the words had been, "until the 1st August, 1836, or until parliament shall *in the meantime* or *sooner* otherwise order;" and that the words "shall immediately thereupon utterly cease and determine" intend, that, if parliament did not in the meantime otherwise order, the powers should cease and determine on the 1st August; and, if parliament did in the meantime otherwise order, that then they should cease and determine upon the day which should be appointed and substituted by the legislature instead of the 1st August. And we feel ourselves warranted in giving this construction to the earlier part of the clause, by the consideration that the last proviso in the same clause contains an enactment relating to the same subject-matter of legislation, and which is free from all ambiguity whatever, viz. "Provided also, that, if parliament shall not otherwise direct before the said 1st day of August, 1836, the Lord Chancellor shall make such orders as he shall see fit for the administration of such estates." And we cannot understand the legislature to have had in its view an alteration by parliament, unlimited in point of time, in the former part, but limited in point of time to the 1st August in the latter part of the same section.

My Lords, the construction contended for on the part of the appellants is further liable to this objection, that it

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leaves the time at which the powers of the former trustees are to cease and determine altogether undefined and uncertain. There might happen, according to that construction, an interval of time of unlimited extent before parliament might think fit to interfere and "otherwise order," and in the meantime, it is obvious, all would be involved in doubt and uncertainty. And again, there is, as it appears to us, a very strong objection against the reading "and" instead of "or," as contended for on the part of the appellants, that is, against reading the act thus, "until the 1st day of August, 1836, *and* until parliament shall otherwise order;" for, this would imply that parliament could have no power to make such an order until after the 1st of August had passed; a construction not only inconsistent with the general authority of parliament, but irreconcilable with the proviso above referred to, which expressly refers to an alteration to be made before the 1st August. Upon the whole, we think that the administration of the charity estates and funds did not continue in the persons described in the 71st section after the 1st of August, 1836.



In the Matter of the BRAYE Peerage and the CAMOYS Peerage.

*Monday,
 July 15th.*

During the abeyance of a barony descendible to heirs of the body, one of the co-heirs was attainted for treason: an act of parliament afterwards passed to restore in blood the sons and daughters of the attainted co-heir:—Held, that it was competent to the Crown to determine the abeyance in favour either of a party claiming through the co-heir who was so attainted, or of one claiming through another co-heir.

THE following questions were proposed by the House of Lords to her Majesty's Judges:—

"During the abeyance of a barony descendible to heirs of the body, one of the co-heirs was attainted for treason. An act of parliament afterwards passed in the following terms:—

During the abeyance of a barony descendible to heirs of the body, one of the co-heirs was attainted for treason: an act of parliament afterwards passed to restore in blood the sons and daughters of the attainted co-heir:—Held, that it was competent to the Crown to determine the abeyance in favour either of a party claiming through the co-heir who was so attainted, or of one claiming through another co-heir.

“ ‘ An act to restore in blood the sons and daughters of Edward Lewknor, Esq. Anno primo Elizabeth. No. 32.

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“ ‘ In most humble and lamentable wise shewen unto yo^r heighness yo^r faithfull and most obedient subiects, Edward Lewkno^r, Thomas Lewkno^r, Steven Lewkno^r, and William Lewkno^r, Jane Lewkno^r, Maria Lewkno^r, Elizabeth Lewkno^r, Anne Lewkno^r, Dorathie Lewkno^r, and Lucrecie Lewkno^r, sonnes and daughters to Edward Lewkno^r, late of Kyngeston Bowsey, in the county of Sussex, Esquier, that where the said Edward Lewkno^r, their father, in the time of yo^r Heighness syster the Quene's Ma^{ty} that deade is, was attaynted of heighe treason, and by reason thereof yo^r said subiects and every of them standen and be parsons in their linage and blood corrupted, whereby they and every of them be not only deprived of all manor degrees, states, names, fames, and of all inheritance that shoulde or might have come vnto them or any of them from or by their saide father, if the same their late father had not been attaynted, but also of all and singular other inheritance that shoulde or mighte by possibilitie have come vnto yo^r saide subiectes by any other their collaterall auncestor or auncestors of the parte of ther saide father, to whome they or any of them shoulde or mighte have coveyed or may coveye themselves as nexte cousen and heyer of blood by meane degrees by their saide father, whereby yo^r saide subiectes as now reste out of all name and reputation, to their greate discomfort and daylie sorrowes: And, forasmuche as yo^r said subiectes be and alwayes have been to yo^r Heighnes trewe and faithfull subiectes, it may therefore please yo^r Heighnes of yo^r most noble and habundance grace, and for the trewe and faithfull service w^{ch} yo^r saide subiectes intend to dve to yo^r Ma^{ty}, and yo^r heyres and successores, during their lives, that it may be at the humble sute and petition of yo^r saide subiectes ordeyned, established, and enacted by yo^r Heighnes, wth the assent of the lords spirituall and temporall, and

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of the comens, in this presente parlyament assembled, and by authoritie of the same, that yo^r saide subiectes Edward Lewkno^r, Thomas Lewkno^r, Steven Lewkno^r, William Lewkno^r, Jane Lewkno^r, Mary Lewkno^r, Elizabethhe Lewkno^r, Anne Lewkno^r, Dorathie Lewkno^r, and Lucrecie Lewkno^r, and every of them, and their heyres, and the heyres of every of them, from henceforth may and shall be by the authoritie of this acte restored and enabled only in blood and lynage as heyre and heyres to the said Edward Lewkno^r their father in such and like manner, fourme, degree, and condiçon, to all intents cōstrucçons, and purposes as they or any of them, their heyres, or the heyres of any of them, mighte or shoulde have been if the said Edward Lewkno^r their father had not been attaynted; and also that yo^r saide subiectes Edward, Thomas, Steven, William, Jane, Mary, Elizabethhe, Anne, Dorathie, and Lucrecie, and every of them, and their heyres, and the heyres of every of them, from henceforthe may and shall be enabled to demaunde and to have, hold, and enjoy all suche lands, ten^{ts}, and hereditaments, wth their app^{te}tenances, which at anye tyme hereafter shall descende, come, remayne, or reverte from any of their collaterall or lynceall ancestors of the parte of the said Edward Lewkno^r, their late father, other than such castells, mannors, lands, ten^{ts}, rents, reverçons, remaynders, serviçs, possessions, and other hereditaments, w^{ch} were of the saide Edward Lewkno^r, their saide father, in vse, possession, reverçon, or otherwise, the day of the attayndor of the saide Edward Lewkno^r, or the day of the saide treason by him cōmitted, and other than such castells, honors, mannors, lands, ten^{ts}, and other hereditaments, as your Heighness sister Queene Mary, or yo^r Heighness, was or is entitled to have, or mighte or oughte to have by force of the said attayndor, or by reason of any office founde or to be founde after the said attayndor, in such and like manner, fourme, and condiçon to all intents, cōstrucçons, and purposes as if the saide Edward Lewk-

no^r, late father to your saide subiectes, had never been attaynted, and as thoughte no such attayndor of the saide Edward Lewkno^r had been had or made; and that yo^r saide subiectes Edward Lewkno^r, Thomas Lewkno^r, Steven Lewkno^r, and William Lewkno^r, Jane Lewkno^r, Mary Lewkno^r, Elizabeth Lewkno^r, Anne Lewkno^r, Dorathie Lewkno^r, and Lucrecie Lewkno^r, and every of them, and their heyres, and the heyres of every of them, may hereafter vse and have any accon or sute, and make his or their pedegrees and conveyance in blood, lynage, and degree as heyres, or heyres only as well to and from the saide Edward Lewkno^r their father as als to and from any other parson and parsons, in like manner, fourme, condiçon, and degree, to all intents, constructions, and purposes as if the said Edward Lewkno^r their saide late father had never ben attaynted, and as if no such attayndor were or had been hadd; the corrupcion of blood between the saide Edward Lewkno^r and yo^r saide subiectes and their heyres, or any acte of parliamente or judgment at the cōmon lawe concernynge the attayndo^r of the said Edward Lewkno^r, or any other thinge wherebye the blood of the saide Edward Lewkno^r is or shoulde bee corrupted, to the contrary in any wise not w^tstandinge: Provided alwayes, and be it enacted by th^e auctorite aforesaide, that this presente acte, or any thinge therein conteyned, shall not extende to enhable, restore, or entitle yo^r saide subiectes, or any of them, or any of their heyres, to any honours, castells, mannors, lordeshippes, lands, teñts, and other hereditaments w^{ch} yo^r Heigness now hathe or had, or is, mighte, or oughte to be entitled to have by reason of any attayndor or attayndors of the same Edward Lewkno^r, or otherwise, nor to any castells, honors, mannors, lordeshippes, lands, teñts, rents, reverçons, serviçs, and other hereditaments, late of the saide Edward Lewkno^r, w^{ch} yo^r ma^{ty} sister, the late Quene Mary was entitled to haue by reason or force of the saide attaindo^r or otherwise, savinge to yo^r heighnes, yo^r heyres and successores, and to all and euery other par-

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son and parsons, bodyes politique, corporate, their heyres and successors, and to the heires and successors of euery of them, all such estate, possession, righte, title, interest, reuerſion, remainder, entrie, lease and leases, clayme, codiſion, tearme of years, rents, and all other profits and comodities whatſoeuer, as yo^r Heighness or any of them haue in or to any honnors, castells, mannors, lands, teñts, rents, profits, and hereditaments, in such manner, fourme, and condiſion, to all intents and purposes, as though this acte had neuer been had or made: Provided alwaise that this acte, ne any thinge therein conteyned, extende not ne be preiudiciall to yo^r saide moste humble subiects, or any of them, their heyers or assignes, or the heyers or assigns of any of them, for or concerning any mannors, lands, teñts, or other hereditaments w^{ch} yo^r said subiectes or any of them haue or hathe by any good, lawfvll, and perfect feoffment, gift, and assurance, or other conveyance to them or any of them had or made by any of their lyneall or collaterall ancestors, or by any other parson or parsons.'

" A. claims through the co-heir who was so attainted.
 B. claims through another co-heir.

" First—It is competent for the Crown to determine the abeyance in favour of A.?

" Secondly—It is competent for the Crown to determine the abeyance in favour of B.?

The judges who heard the arguments, requested time to consider: and now their unanimous opinion was delivered by—

TINDAL, C. J.—My Lords—In the questions proposed by your lordships' House to her majesty's judges, it is first supposed that, during the abeyance of a barony descendible to the heirs of the body, one of the co-heirs is attainted for treason, and after reference made to a certain act of parliament passed in the First year of the reign of Queen Eliza-

beth, intituled "An act to restore in blood the sons and daughters of Edward Lewknor, Esquire," it is further supposed that A. claims through the co-heir who was so attainted, and B. through another co-heir; and your lordships then require the opinion of the judges on these two points—first, is it competent for the Crown to determine the abeyance in favour of A?—secondly, is it competent for the Crown to determine the abeyance in favour of B.? And, although the consideration of the questions submitted to us involves some matters of curious learning, upon which no direct authority is to be found in the books, yet, looking at the principle by which we conceive the subject-matter of those questions is to be governed, and reasoning by the analogy to be derived from the decisions of our courts of law, so far as they can be held to apply to inheritances of so peculiar a nature as those under consideration, and still further bearing in mind the decisions of this House on cases which have been brought before it, the judges who have heard the argument at your lordships' bar have arrived at the unanimous opinion that both the questions proposed to us are to be answered in the affirmative.

My Lords—The general rule by which the abeyance of a dignity or title of honor is governed, was not disputed at your lordships' bar. It has been indeed the established and undoubted law upon this subject from a very early period of our history, that, in the case of a barony descendible either to the heirs general or to the heirs of the body, if the baron die, leaving only daughters or sisters or other co-heirs, the dignity is in abeyance so long as more than one of such co-heirs is in existence; but so, nevertheless, that the Crown, the sovereign of honour and dignity, may at any time during the abeyance determine it by conferring the dignity on whichever of the co-heirs it pleases: but, if the Crown do not exercise such prerogative, and the heirs of all the co-heirs but one become extinct, then the abeyance is at an end, and such only surviving co-heir is enti-

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tled as a matter of right to the enjoyment of the dignity. Lord Coke, indeed, in his First Institute, 165. a., seems to think that such has been the law from the time of the Conquest; but it has at all events been acted upon at the least as early as the reign of Henry the Sixth, who in the case of the Lord Cromwell dying without issue male, and leaving several daughters, preferred the youngest; and in more modern times this exercise of the royal prerogative has been repeatedly put in force, as, amongst many others, in the case of the earldom of Oxford, in 1625, and in that of the barony of Grey of Ruthin—See Collins's Claims, &c., pp. 175, 148.

Consequences
of the attainder
of one of the
co-heirs pend-
ing the abey-
ance.

But the great contention at your lordships' bar has turned, not upon the fact, but upon the nature and qualities of this abeyancy, and upon the legal consequences of the attainder of one of the co-heirs pending such abeyance; it being contended, on the one part, that the attainder of one co-heir operates as a forfeiture and extinguishment of the dignity as to all, and consequently as a restraint of the exercise of the royal prerogative in giving a preference to any of the unattainted co-heirs; whereas it is argued, on the part of the claimants, that it can have no effect whatever upon the unattainted line, but at the utmost restrains the Crown from conferring the dignity on any descendant in the attainted line so long as the corruption of blood by means of the attainder continues. And the argument upon which the forfeiture or total extinguishment of the dignity rests for its support is this, that the abeyance of a dignity means no more than that *the person* who shall enjoy it is at the time in uncertainty and expectation, not that *the inheritance* itself is in suspense; but that such inheritance in the meantime descends to and vests in all the co-heirs equally, and that the dignity being so vested jointly and equally in all the co-heirs, and being at the same time in its own nature indivisible and impartible, the attainder of one co-heir works the forfeiture of his share, and, all the

parts or shares in the barony being essential to the constitution of the dignity of baron, and one of them being forfeited, the whole becomes necessarily extinguished. And the authority which has been principally relied upon in support of these positions, is the very learned speech of Lord Chief Justice Eyre, when called upon to deliver the opinions of the judges in answer to the question proposed to them by this House in the year 1795, on occasion of a claim to the barony of Beaumont: in one part of which speech that learned person had expressed himself, that "the title of the co-heirs of a barony is that of *unus hæres* and *unum corpus*—it is *unitas juris*—*they must take it, and it must vest in them as the heir of the ancestors.*"

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Now, before entering upon any discussion of the points submitted to us, it is to be observed that this dictum of Lord Chief Justice Eyre, upon which so great reliance has been placed, was not in any way necessary for the determination of the question put upon that occasion by your lordships' House to the judges. The question submitted to them was, whether, supposing the claimant to have proved himself one of the co-heirs of the barony of Beaumont, he was then entitled of right to the barony; or, in other words, whether one of two co-heirs was a complete heir to the ancestor: a question which the judges necessarily answered in the negative. But this answer must equally have been given by them, whether the dignity had vested in the co-heirs, or whether it had, by means of its being in abeyance, become vested in the Crown; in either case, the answer to the question must have been, that the one co-heir was not the complete heir, so as to claim the barony as a matter of right. The observation, therefore, to whatever weight it may be entitled as coming from so able a judge, is not to be considered as bearing the same stamp of authority as the opinion of the judges expressed on the very point on which they were called on to advise.

Observations
upon the dictum
of Eyre, C. J.,
in the case of
the Beaumont
barony.

And it is obvious that the whole strength of the position

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advanced by the Attorney-General must depend on these two data—first, that, when a barony is in abeyance, the share of each co-heir in such barony descends to and vests in such co-heir—and, secondly, that the attainder of any one co-heir operates as a forfeiture of the part so vested in him; for, if either of these data fail—if, on the one hand, such be the nature of the abeyance of a dignity that it causes the dignity to revert to or be in the Crown, or, in the language of the old books, to exist in contemplation of law only, instead of vesting in the co-heirs, as is the case with lands and other descendible hereditaments, it is manifest there can be no forfeiture by the co-heir of that which was not in him at the time of the attainder; and, again, even admitting that the share of this impartible dignity did, upon the abeyance taking place, descend to and vest in the co-heir, still, if his interest is not a right of such a nature or description as can be the subject of forfeiture—in either case, the consequence which has been deduced from the premises, that the whole dignity is extinguished or gone, becomes altogether untenable.

In order, therefore, to arrive at a just conclusion on the questions put to us, it may be advisable to consider, in the first place, the properties of the abeyance of a dignity, and the legal consequences which flow from such abeyance; and, in the next place, how far any right or interest which can by possibility vest in the co-heir pending the abeyancy, is capable by law of being the subject-matter of forfeiture.

As to the abeyance of an inheritance in land, &c.

My lords—All the instances found in the books, of the inheritance in land or other tenements being in abeyance, have this common property, that there is no person in existence who is capable of taking. Tenant for term of another life dies; the freehold is said to be in abeyance until the occupant enters. Lease for life, remainder to the right heirs of J. S.; the fee-simple is in abeyance till J. S. dies. Co. Litt. 342. b. If the parson of a church

dies, the freehold of the glebe is in none during the time the parsonage is void, but in abeyance, viz. in consideration and in the understanding of the law, until another be made parson of the same church; and immediately when another is made parson, the freehold in deed is in him as successor. Littleton, s. 647. And it is an admitted consequence, that, where the right of the fee-simple is in such abeyance that by possibility it may every hour come in esse, there the fee-simple cannot be charged, granted, or *forfeited*, until it come in esse. Lease for life, remainder to the right heirs of J. S.; the fee-simple cannot be charged till J. S. be dead—Co. Litt. 343; or, as is stated in *Termes de la Ley*, title *Abeyance*, after one comes in existence to take, it is no longer in abeyance, but in such sort “that the right heir may grant, *forfeit*, or otherwise dispose of the same.”

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Further, the peculiar nature of the inheritance in a dignity or title of honor has an important bearing on the question whether it is capable of vesting in co-heirs. That lands and tenements of inheritance vest in co-heirs, is undeniable: the law of parcenery is too well known to make it necessary to advert to it. But, in all the instances in which inheritances are stated in our books to vest in co-heirs, that is, in several persons making together one heir, it will be found that the hereditament is always capable of being actually enjoyed by the co-heirs. Land itself may be either held and enjoyed by all the co-heirs jointly, or, after partition made, by each co-heir in severalty. Where the tenements are in their nature entire and indivisible, as in the case of advowsons, the co-heirs may enjoy by appointing to the living in turn, according to their seniority. If under the ancient law a villein had descended to the co-heirs, either the profits were divided, or one co-heir had the services of the villein for one week, the other for the next. In the case of common without number, or piscary, estovers, and the like, the eldest co-heir

As to the vesting—
 in the case of lands;

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shall take, and the rest shall have contribution; or, if the eldest cannot make contribution, there shall be an allotment made to one for so long time, and afterwards to the others; and so as to a mill or a toll. But, in all these cases, the subject-matter is capable of actual pernaney and enjoyment, and it is absolutely necessary for the purpose of having such enjoyment that it should descend to and vest in the co-heirs; the inheritance therefore descends upon them, and they settle and arrange the mode of enjoyment amongst themselves. But far different is the case of a dignity; it is an inheritance which is peculiarly *sui generis*; it is not only in its nature impartible amongst the co-heirs, but in its undivided state utterly incapable of being enjoyed by one co-heir. They cannot all take the barony; no one can take it by law in preference to another: nor is there any mode, by mutual arrangement, concession, or otherwise, by which all can enable any individual co-heir to wear the dignity. The reason therefore fails for holding that they take the inheritance of the barony, when they cannot take it for any available purpose. And this consideration at the same time fortifies and confirms the doctrine of abeyance as understood in antient times, which places the inheritance anywhere, rather than in the co-heirs.

And this mode of reasoning agrees with the law laid down by Lord Coke—1st Inst. 165. a.—viz. “that the king, who is the sovereign of honor and dignity, may, for the uncertainty, *confer* the dignity upon which of the daughters he pleases;” and, again, with that of Whitlocke, who says: “The King may *revive* the honor in the issue of either, or suffer it to lie in abeyance or unrevived:” language which of itself seems to import that the dignity has not vested in any of the co-heirs; for, he that has the power to *confer*, must already have the dignity in himself before and at the time of his so conferring it: whereas, if the dignity was already vested in others, it must first be

devested out of those co-heirs, before, in strictness of language, the sovereign would be in a condition to *confer* it. The writ of summons, or the patent, according as the co-heir is a male or a female, must, on that supposition, have a double operation, one of which is very foreign to the nature of either, viz. that of divesting the inheritance in the dignity out of the several co-heirs, except as to the one who is favoured and preferred, and uniting the different shares in him.

Looking, therefore, at the peculiar description and properties of a dignity or name of nobility, there appears nothing in the nature of the inheritance, or, in reason, that should à priori cause it to descend to and vest in the co-heirs, who are altogether incapable of taking in the only way in which the subject-matter can be enjoyed, that is, by wearing the dignity; and, on the contrary, it would seem much more suitable to its nature, and more consonant to reason, that, when it has arrived in the stream of descent at a point beyond which it can no longer proceed in its regular course, when it is confessedly by all in a state of abeyance, it should revert to, and, so long as such abeyance continues, remain in, the Crown, that fountain of honor from which it originally proceeded.

But there is an authority on this subject, entitled to the greatest weight, and proving that this doctrine does not rest upon speculation and argument alone. I allude to the judgment in the case of the claims of the Lord Willoughby of Eresby and the Earl of Oxford to the great office of Lord Chamberlain, and the baronies of Bulbeck, Sandford, and Badlesmere. In that case the judges certify to your Lordship's House, "that John, the fifth Earl of Oxford, dying without issue, those baronies descended upon his sisters and heirs, but, these dignities being entire, and not dividable, they became incapable of the same, otherwise than by gift from the Crown, and they, in strictness of law, *reverted unto and were in the disposition of King*

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Henry the Eighth." Coll. Claims, 175 ; Sir W. Jones, 96. And again, in a further opinion, the language employed by the same eminent judge, is this, "That, by the death of Earl John, in 18 Henry the Eighth (Coll. p. 180) without issue, leaving three sisters, those honors *returned to the Crown* in strict construction of law ;" and thereupon this House agreed, "that the three baronies are in his Majesty's disposition ;" and, in the formal certificate delivered to the king of the opinion of this House, they say, "That, for the baronies, they are wholly in your Majesty's hands, to dispose of at your pleasure." Journ. Vol. 3, p. 552. Now, although it must be admitted that the generality of this certificate, which perhaps exceeded in its application what was intended by the learned judges themselves, has been in subsequent cases qualified and limited by restraining the power of the Crown to that of selecting one amongst the co-heirs, and again, in another particular, viz. that the co-heirs being reduced to one, such surviving co-heir has the right ; still the main ground of the decision, viz. that the dignity had reverted to the Crown, remains altogether unshaken ; and the inference to be drawn from that judgment is, that, where all have equal pretence, and no one can claim *ex debito*, the dignity is to be considered as in the Crown.

And, as to the objection urged by the Attorney-General, that there must of necessity be an actual descent and vesting in the co-heirs, for, on no other supposition could the only surviving co-heir claim a writ of summons as a matter of right ; the answer may well be, that, when the number is reduced to one, the only reason and cause of any suspension or abeyance is at an end, and that, the reason ceasing, the consequence also ceases, and the whole entire and impartible dignity may then be well supposed to fall upon the complete heir, as in the usual course of descent.

Attainder of one
of several co-
heirs, no for-

Now, if it be the law, that the barony does not descend to the co-heirs, and vest in each in separate parts and

shares, there is at once an answer to the question, whether, whilst the dignity is in abeyance, the attainder of one of the co-heirs shall operate as a forfeiture or extinguishment of such dignity; for, upon that supposition, there was nothing in the person attainted which could become the subject of forfeiture; the whole had reverted to the Crown for the preservation of the title until the co-heirs were reduced to one, or until the Crown in the meantime declared a preference: *Privatio præsupponit habitum*: and on the supposition above made, the party who was attainted had nothing in the dignity to forfeit.

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feiture or extin-
guishment of
the dignity—

But, my Lords, conceding, for the sake of argument, and for that purpose only, that, pending the abeyance, the inheritance in the dignity had descended to and amongst the several co-heirs in the same manner as any other inheritance, still no authority has been cited in support of the position that the attainder of one co-heir would operate as a forfeiture of the whole dignity. It is evident from the old authorities, that, in the case of land, a co-heir attainted of felony or treason forfeits the share descended to him, and that share only. If the other co-heirs sue, and there is a plea in abatement that one of the co-heirs is not joined as a co-demandant, those who are demandants may reply "that he need not be joined, for that he has committed felony, so that he is not a parcener." *Fleta*, cap. 48, *De Exceptione ex Omissione Participis*. If, therefore, the inheritance had descended, and had been considered as partible, the attainder of one co-heir could not have operated as a forfeiture of the title to the shares vested in the other co-heirs. And, if such be the law in cases of partible inheritances, it would surely be a strange conclusion, that, because, from the peculiar nature of a dignity, it is impartible, therefore the whole should be forfeited by the attainder of one. Forfeiture is always odious in the eye of the law; and the inference, at once more just and more consistent with the genius of our law, would be, that, where the in-

at least as to the
whole.

In the case of
land held in
parcenary.

Forfeiture
odious.

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Whether the
interest which
devolves upon
each co-heir
pending the
abeyance can be
the subject of
forfeiture?

What forfeited
by attainder at
common law:

by statute.

Rights of action.

heritance is impartible, on that very account there should be no forfeiture at all, inasmuch as the opposite determination would confound in one common punishment the innocent with the guilty.

And, my Lords, it should be further considered whether the interest which devolves upon each co-heir pending the abeyancy, supposing the dignity not to revert to the Crown, is of such a nature and description as to be the subject of forfeiture, either by common law or statute. That all dignities or titles of honor, whatever be the estate in them, are forfeited and lost by the attainder of the possessor for high treason, is undoubted law. "Is it not," as has been justly asked by Mr. Charles Yorke, in his *Considerations on the Law of Forfeiture*, p. 30, "both natural and politic, that a distinction bestowed only for the praise of them who do well, should be forfeitable on the commission of crimes, for a terror to evil-doers?" But neither by common law or statute did the law of forfeiture comprehend within its limit any such right as that which is supposed to exist in the attainted co-heir, or any right bearing any analogy to it. At common law, the only real estate which was forfeited by attainder for treason, was, all the lands of inheritance whereof the offender was seised in his own right, and all rights of entry to lands in the hands of a wrong-doer; and under the statutes 26 Hen. 8, c. 13, and 33 Hen. 8, c. 20, such forfeiture was made to extend to estates tail vested in possession; but it had always been held, that neither by common law or statute was a mere right of *action* to lands in the hands of a stranger, as, for instance, in the hands of a discontinuee, or of the heir of the disseisor, forfeitable by attainder for treason—Co. Litt. 348; Comyns's Digest, *Forfeiture*, (B. 1.); 3 Rep. 2. b. But, how far does the interest which is in the attainted co-heir at the time of the attainder fall short of a right of action? It is a part or portion only of the title of co-heir to the dignity, giving the possessor of it at the utmost a jus pre-

carium, a mere power of asking from the grace and favour of the Sovereign that the abeyant dignity may be conferred upon him, with the distant chance, that, in case all the other lines should fail, the attainted co-heir may, in case the corruption of blood be removed, wear the dignity himself.

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Other considerations of a nature perfectly distinct range themselves on the same side of the question, and strengthen the inference that no forfeiture of the dignity can under the circumstances assumed take place. To hold that the dignity is extinguished or forfeited, whilst it remains with the Crown by an exercise of its prerogative to revive it and confer that dignity on one of the innocent co-heirs, what is it in effect but to abridge and limit such prerogative of the Crown, and to operate more as a penalty upon the innocent co-heirs than on the guilty offender? And I must confess I feel strongly the weight of the observation which has been made at your Lordships' bar, that, if the attainder of one of the co-heirs of a barony *whilst* it is in abeyance causes the extinguishment or forfeiture of the abeyant barony, it must be matter of very considerable doubt whether such an attainder *after* the abeyance has been determined, and the barony revived by the Crown, must not be attended with a similar consequence; for, it is one and the same dignity whether it is in abeyance or in possession; and upon all just principles of reasoning, the continued existence of such dignity must be held to depend equally, in both cases, upon the same title, and the same connexion with the deceased ancestor.

Consequences of
holding the dig-
nity forfeited.

But I forbear to pursue the consideration of these additional arguments, because, as it appears to me, the very principle now under discussion, viz. that the attainder of one of the co-heirs shall not operate as a bar to one claiming through another of the co-heirs to the dignity, has been virtually adopted and acted upon by your Lordships' House in several cases. I refer to the case of the Powys *Powys barony.*

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barony.

Ante, p. 115.

Barony, where John Gray, the descendant of one of the co-heirs of Edward Charleton, Lord Powys, was summoned to parliament in the 22nd year of Edward the Fourth, after the attainder, and before the restoration in blood, of John, Lord Tiptoft, the other co-heir, enjoying upon that writ of summons the seat and precedence of his ancestor. I refer again to the Barony of Beaumont, in the first petition of the claimant to which barony he made title as sole heir, upon the ground that the attainder of the other co-heir had extinguished that line; and which petition gave occasion to the learned discussion of Lord Chief Justice Eyre before referred to. Upon the occasion of his second petition he stated his title as one of the co-heirs of Henry, the first Baron Beaumont, by his descent through Joan, Lady Stapleton, Sir Henry Norreys, the son of Frideswide, the other co-heir of the barony, having been attainted and executed in the 28th year of Henry the Eighth. Upon the second petition the report of the very learned Attorney-General of the day, Sir John Scott, raises no difficulty as to the extinguishment or forfeiture of the barony, but simply states it to be in abeyance: and the committee of this House, after argument before Lord Loughborough, the then Lord Chancellor, came to the resolution, which was afterwards reported to the House, "That it appears to this committee that the said barony remains in abeyance between the co-heirs of the said William descended from his sister Joan;" which resolution was received and adopted by this House.

As to the operation and effect of the act of 1 Eliz. No. 32.

My Lords, such being the grounds upon which the rights of the co-heir in the unattainted line depend, it remains only to make an observation upon the legal operation and effect of the act 1 Eliz. No. 32, to which your lordships' question makes reference, with regard to the rights that may be claimed by the co-heir in the attainted line.

And, my Lords, it appears by the statute that nothing that had been lost by the attainder has been restored to

the descendants of the attainted person, but that the corruption of blood is so completely removed thereby, that the heir may claim through his attainted ancestor as if no attainer had taken place. That the previous attainder of the co-heir effected no forfeiture of the abeyant barony, has been already so fully discussed as to make it unnecessary to state more than that the descendant of such attainted co-heir may claim the right of petitioning her Majesty that she would terminate the abeyance of the barony by giving the preference to the line of such petitioner, in the same manner as if his ancestor had never been attainted.

Upon the whole, although I should not be justified in making my learned Brethren responsible for the precise grounds upon which I have endeavoured to support their opinion and my own, yet I have their full authority to declare our unanimous answer to the questions proposed to us, as follows:—

First, that it is competent to the Crown to determine the abeyance in favour of A.

Secondly, that it is competent to the Crown to determine the abeyance in favour of B. (24).

(24) The case was argued by the *Attorney-General* on the part of the Crown; and by the *Solicitor-General*, *Sir W. Fullett*, *Sir N. Harris Nicolas*, and *Tennant*, on behalf of the several claimants to the respective Baronies.

The act of parliament not yet made, p. 169, is applicable to the case of the *Camroys' barony* only; though the same point was involved in both cases, and the arguments were equally applicable to both.

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suggestion to be entered. (30) [The Court intimated that there was nothing in the second and third objections.]

4. There is no reason why executors or administrators should be exempted from double costs under this act. It was expressly decided in *Wase v. Wyburd*, Doug. 246, that, if an action of assumpsit is brought against an inhabitant of Middlesex by an administrator, and the damages found are under forty shillings, the defendant is entitled to have that suggested on the roll in the same manner as if the plaintiff had sued in his own right. The same argument was urged there that has been urged to-day, and without success. The sole question is, whether or not an executor or administrator is bound to sue in the Middlesex county court for a debt recoverable there; for, if so, the costs follow as the consequence of suing improperly in a superior court.

First point.

TINDAL, C. J.—1. It appears to me that the first objection urged on the part of the plaintiff ought not to be allowed. The affidavit pursues the language of the 19th section of the statute, as well as of the suggestion. If the plaintiff wished to avail herself of the proviso in the 4th section—"that no person or persons shall be liable to be summoned to the said county court at the suit of any plaintiff or plaintiffs, other than such person or persons as was or were liable to be summoned to the county court of Middlesex before this act was made, and that this act shall not extend to give the said county court any jurisdiction to hold plea of or to hear or determine any action, cause, or suit, other than such action, cause, or suit as the county court of Middlesex might have held plea of by plaint before

(30) In *Shaw v. Oates*. 4 Dowl. 720, it was held that a defendant, by consenting to a cause being tried before the sheriff, under the writ of trial act, knowing at the time that

he was liable to be sued for the debt in a local court only, does not thereby waive his right to claim costs from the plaintiff, upon his recovering less than 5*l*.

the making of the act"—she should by her affidavit have brought her case within it (31).

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4. The last objection appears to me to be equally untenable. The words of the 3 & 4 Will. 4, c. 42, s. 31, are very general: "in *every* action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself." Executors and administrators plaintiffs are therefore now placed as to costs in the same situation as other plaintiffs, except that they may be relieved therefrom upon an application to the equitable discretion of the court or a judge. I see no reason why such persons should be freed from the penalty imposed by the 23 Geo. 2, c. 33, s. 19. The rule for entering a suggestion must therefore be made absolute.

BOSANQUET, J.—I am of the same opinion. It sufficiently appears from the affidavit upon which this rule was obtained that the defendant was liable to be summoned to the Middlesex county court. In *Wase v. Wyburd*, the situation of the administrator with reference to the liability to double costs was expressly brought to the attention of the court; to which it was answered that the defendant had a right to the suggestion whatever consequence it might have: and the rule was made absolute expressly on the

First point.

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(31) In *Barney v. Tubb*, 2 H. Blac. 350, Buller, J., says: "The affidavit [i. e. the affidavit upon which the motion is founded] ought to contain all the facts necessary

to bring the case within the act; for, if we are to grant leave to enter the suggestion, it must be upon such a state of facts as will warrant us in so doing."

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ground that there was no exception as to administrators in the statute.

COLTMAN, J.—I am of the same opinion. Upon the last point, *Wase v. Wyburd* is a direct authority.

Rule absolute.

Tuesday,
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In trover against an executor, it appeared that the watch which was the subject-matter of the action had been given by the testatrix to one S. in September, 1837; that S. re-delivered it to the testatrix in March, 1838, for the purpose of its being pawned by her; that, on its being demanded by the plaintiff in December, 1838, the testatrix said that she would consult her solicitor; and that the testatrix died in March, 1839:—Held, that this was sufficient evidence to warrant the jury in finding a conversion within six months before the death.

RICHMOND v. NICHOLSON, Executor of HARRIET REEVES.

THIS was an action of trover for a watch, brought against the defendant as executor of one Harriet Reeves, deceased. The declaration stated that Harriet Reeves died on the 27th March, 1839, and alleged a conversion by her within six calendar months next before her decease.

The defendant pleaded—first, that Harriet Reeves, in her lifetime and within six calendar months next before the time of her death, was not guilty of the grievances alleged—secondly, that the plaintiff was not possessed of the watch as of his own property.

The cause was tried before Lord Denman, C. J., at the last Assizes for the county of Surrey. In order to prove the alleged conversion, the plaintiff called a witness who proved, that, in December, 1838, he in company with the plaintiff called upon Harriet Reeves; that the plaintiff demanded the watch of her, when she said—"I shall not talk to you any more, but shall see my solicitor." It did not appear whether or not the testatrix had the watch in her possession at this time. It was further proved, on the part of the defendant, that there had also been a demand and refusal in October, 1837, and that, in September, 1837, Harriet Reeves gave the watch in question to one Spencer. Spencer was called: he stated that he kept the watch till March, 1838; that Harriet Reeves then sent for him, and requested him to let her have it "to make money on it;" that he refused to pawn it for her, but delivered it to her for the purpose of pawning it.

Lord Denman told the jury, that, the watch appearing to have got into the possession of Harriet Reeves after the actual conversion in September, 1837, and the demand and refusal in October, 1837, and, for anything that appeared, remaining in her possession at the time of the demand and refusal in December, 1838, there was evidence whence they might infer a conversion within six months next before her decease.

The jury returned a verdict for the plaintiff—damages, 20*l*.

Montagu Chambers moved for a new trial, on the grounds of misdirection and that the verdict was not warranted by the evidence.—Where an executor or administrator is sued in respect of an injury sustained by the tortious act of the testator or intestate, it is incumbent on the plaintiff to shew that such injury was committed within six calendar months before such person's death—3 & 4 Will. 4, c. 42, s. 2 (32). The only proof the plaintiff here

(32) Which enacts that "an action of trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person committed in his life-time, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages when recovered shall be part of the personal estate of such person: and an action of trespass, or trespass on the case, as the case may be, may be main-

tained *against* the executors or administrators of any person deceased, for any wrong committed by him in his life-time to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months *after* such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple-contract debts of such persons." See *Powell v. Rees*, 7 Ad. & E. 426, 2 N. & P. 571.

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gave that the injury was committed within six months before the death of the testatrix, was, the demand and refusal in December, 1838. A demand and refusal are not evidence of a conversion *at the time* of the demand and refusal, but of a *prior* conversion—*Walton v. Girdlestone*, 5 B. & Ald. 847; and, in order to establish a conversion by a mere demand and refusal, it must appear that the chattel was in the possession or under the control of the defendant at the time the demand is made. In *Smith v. Young*, 1 Camp. 439, in trover for a lease, it appeared, that, when the lease was demanded, the defendant said—“he would not deliver it up: but it was then in the hands of his attorney, who had a lien upon it for a small sum of money due to him:” it was held that this did not amount to a conversion. “The defendant,” said Lord Ellenborough, “would have been guilty of a conversion if it had been in his power; but the intention is not enough. There must be an actual tort. To make a demand and refusal sufficient evidence of a conversion, the party when he refuses must have it in his power to deliver up or to detain the article demanded.” It was at all events, therefore, incumbent on the plaintiff to shew that the watch was in the possession of Harriet Reeves at the time of the demand in December, 1838. [*Tindal*, C. J.—It appears from Spencer’s evidence that the watch came to the hands of the testatrix in March, 1838: the presumption is that it remained in her possession; and, when the subsequent demand was made, in December, 1838, she seems to have admitted that it was still in her hands, for, she said she would consult her solicitor.] The presumption that the watch remained in the possession of the testatrix after it had been re-delivered to her by Spencer, is rebutted by the evidence of the particular purpose for which it was so returned to her. That should at all events have been specifically left to the jury.

TINDAL, C. J.—The ground of objection to the verdict in this case is, that the demand and refusal were made under such circumstances that the jury were not warranted in inferring a conversion within six months next before the death of the testatrix: and this is bottomed upon an alleged omission on the part of the learned judge to tell the jury that there was evidence whence they ought to assume that the watch was out of her possession at the time of the demand in December, 1838. The objection, however, comes too late, unless the learned judge's attention was called to the point; which it seems it was not. Upon the statement now made to us, it does not appear to me that the presumption could be any other than one way. The watch being demanded of the testatrix within the six months, she does not deny that she has it: and, there being evidence that it came to her hands in March, 1838, and nothing to shew that it ever got out of her possession, the presumption is that it remained in her hands. I am therefore of opinion that there is no ground for disturbing the verdict.

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BOSANQUET, J.—I see no objection to the mode in which the case was presented to the jury; nor does there appear to me to be any ground for dissenting from their verdict. The watch was shewn to have been in the possession of the testatrix more than six months before her decease; and, until the contrary was proved, the presumption would be that it so remained. When asked within the six months to give it up, she refused: that was clearly evidence of a conversion sufficient to support the action.

COLTMAN, J.—I am also of opinion that there is no ground for disturbing the verdict in this case. Had the learned judge been requested to put the time of the conversion specifically to the jury, he would doubtless have done so with such observations as must have induced the jury to arrive at the same conclusion they have now come

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to. We cannot send a cause down for the purpose of having a point reconsidered, upon which had the verdict been the other way, we should unquestionably have granted a new trial.

ERSKINE, J.—I concur with the rest of the court in thinking that the verdict was warranted by the evidence. None of the facts were withdrawn from the jury.

Rule refused.

*Tuesday,
 Nov. 5th.*

ADCOCK v. FISKE.

After judgment and outlawry of the defendant, he rendered in discharge of his bail, and afterwards obtained his discharge under the insolvent debtors act, subject to an imprisonment of four months at the suit of one of his creditors. Whilst he was in custody pursuant to this adjudication, the plaintiff in this action obtained a habeas corpus in order to bring him up to be charged in execution on the judgment in outlawry. The Warden's return merely recited the fact of the defendant having been outlawed, but did not allege it as a ground of his detention:—Held, that there was nothing upon which he could be charged in execution.

THE defendant was arrested in this action and gave bail. In July, 1838, final judgment was obtained in the action, and the defendant was outlawed. Proceedings were afterwards had against the bail; and on the 11th June last those proceedings were stayed by order of a judge, the defendant having rendered. Subsequently the defendant obtained his discharge under the insolvent debtors act, 1 & 2 Vict. c. 110, as to all the debts in respect of which he was then liable save one, his discharge as to that to take place on the expiration of four months from the date of his vesting order. When the four months were about to expire, viz. on the 12th October, the plaintiff sued out a habeas corpus, in the usual form, under which the defendant was now brought up to be charged in execution.

The Warden of the Fleet returned as follows:—"That, before the coming of the queen's writ of habeas corpus to me directed, and which is hereunto annexed, to wit, on the 10th June, 1839, R. Fiske in the said writ named surrendered in discharge of his bail at the suit of Stephen Adcock, and was thereupon committed; that, on the 2nd August, 1839, a writ of habeas corpus was left, returnable

before her Majesty's justices at Westminster on the 2nd November next, at the suit of Stephen Adcock (the said defendant being outlawed in the county of Cambridge on the 18th April last); that, on the 6th August, 1839, he was charged with a writ of detainer at the suit of James Beale for 214*l.* 16*s.*; that, on the 6th August, 1839, it was ordered by the court for the relief of insolvent debtors that the defendant should be discharged as to the above detainer of Stephen Adcock forthwith, and as to the detainer of James Beale at the period of four calendar months, to be computed from the 14th June last; and that, on the 12th October, 1839, the annexed writ of habeas corpus was left, returnable in court on the 2nd November, at the suit of Stephen Adcock, in an action on promises, the said defendant having been outlawed in the county of Cambridge on the 18th April last."

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Wilde, Serjeant, for the defendant, opposed his being charged in execution, on the ground that he was already discharged from the judgment in the action by virtue of the act, the 75th section of which enacts that the adjudication of the commissioners shall operate his discharge "as to the several debts and sums of money due or claimed to be due at the time of making the vesting order from the prisoner to the several persons named in his schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid;" the 79th, "that every discharge so adjudicated as aforesaid as to any debt or damages of any creditor of such prisoner, shall be deemed to extend also to all costs incurred by such creditor before the filing

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of such prisoner's schedule in any action or suit brought by such creditor against such prisoner for the recovery of the same;" and the 90th, "that no person who shall have become entitled to the benefit of the act by any such adjudication as aforesaid shall at any time thereafter be imprisoned by reason of the judgment so as aforesaid entered up against him or her, according to this act, or for or by reason of any debt or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same; but that, upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money or costs, or judgment, decree, or order for payment of the same, it shall be lawful for any judge of the court from which any process shall have issued in respect thereof, and such judge is hereby required, upon proof made to his satisfaction, that the cause of his arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid was made without due notice, where notice is by this act required, being given to or acknowledged by the plaintiff on such process, or being by him dispensed with by the acceptance of a dividend under the act, or otherwise."

F. Kelly, for the plaintiff, objected that the defendant, being an outlaw, could not be permitted to appear for any other purpose than that of reversing the outlawry—*Summervil v. Watkins*, 14 East, 536. In *Dickson v. Baker*, 1 Ad. & E. 853, it was held that a party outlawed on civil process, after judgment, and on his petition subsequently made to the insolvent debtors court adjudged to be discharged, is not entitled to a reversal of his outlawry, though the debt on which the outlawry is founded be included in his schedule. Lord Denman there says: "Perhaps it may be

a just consequence that the outlawry should be reversed by the discharge of the prisoner under the act. But this court is not called on to take any step. If the adjudication of the insolvent court reverse the outlawry, our interference will not be necessary. But, if we are called on to act, we must see that in so doing we should be following precedents; and we find none." And Littledale, J., said: "It seems hard that a man should be taken up after he has been discharged by the insolvent court; but we have no power to reverse this outlawry. In *Beauchamp v. Tomkins*, 3 Taunt. 141, the court would not reverse the outlawry till error was shewn. In *Summervil v. Watkins*, 14 East, 536, the court seemed to think that the outlaw, who had been bankrupt, and relied on that fact, had not, on that account, any locus standi in judicio. Outlawry has other consequences besides those relating exclusively to the suit in which it originates. The property is forfeited to the Crown; the Crown therefore is interested. What effect the discharge may have upon a future *capias utlagatum*, I do not know. But we cannot reverse the outlawry, except upon seeing that there is error."

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Wilde, Serjeant.—The defendant in this case does not come, as in *Dickson v. Baker*, to procure a reversal of the outlawry: he protests against his being charged in execution in respect of a judgment from all the consequences of which he has duly obtained his discharge under the act. In *Castleman's Case*, 4 Burr. 2119, a party was brought up to the Quarter Sessions, under the insolvent debtors act, 5 Geo. 3, c. 41, and the justices declared him to be irrelievable, *because he was charged with an outlawry*, and therefore they remanded him: the court of King's Bench granted a certiorari, and the order of sessions being removed to that court (*Res v. Castleman*, 4 Burr. 2127), they said: "The justices had no authority to give this negative judgment, 'that he is irrelievable.' 'Tis a nullity: it is no order at

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all. But there is no difficulty, if the justices at sessions will act: he may be brought up again before them; and they may make an order of discharge." That the commissioners had power to discharge the defendant without previous reversal of the outlawry, is clear from the late case of *The Queen v. The Commissioners of the Insolvent Debtors Court, In the Matter of Hamlin*, 3 Nev. & P. 543. That was a rule calling upon the commissioners of the insolvent debtors court to shew cause why a writ of prohibition should not issue directed to them, to prohibit them from further proceeding in an order made by them for the discharge of Hamlin. It appeared that a judgment for 288*l.* damages and costs had been signed against Hamlin in an action for criminal conversation at the suit of one Crossley. Hamlin was proceeded against to outlawry, and ultimately taken on a *capias utlagatum*, and lodged in Hertford Gaol: he petitioned the insolvent debtors court; and on the 13th December, 1837, the commissioners adjudged that he should be discharged after an incarceration of four months from the date of his petition. In the following term the rule for a prohibition was obtained: and in Trinity Term, 1838, Lord Denman delivered the judgment of the court, holding that the commissioners had, under the 7 Geo. 4, c. 57, power to discharge the party, without a previous reversal of the outlawry. The rule, observed his lordship, was obtained, and has been argued, "on the general ground that an outlaw cannot be heard in any court, except for the single purpose of reversing his outlawry. And this is an undoubted rule of law, laid down in numerous cases and text books, the authority of which is fully recognized and was acted upon by the court of Common Pleas in *Loukes v. Holbeche*, 4 Bing. 419, 1 M. & P. 126. Whether the words of the insolvent debtors act, 7 Geo. 4, c. 57, ss. 10, 50, which were cited in the argument as creating an exception from the general rule, ought to have that effect, is the question which we are now called upon to decide. But in truth we

cannot consider it an open question. The words 'by any process whatsoever,' 'by reason of any damages,' are undeniably extensive enough to embrace a person outlawed in an action; whether it be an action of tort, or in debt or assumpsit, appears to make no difference in the case. There may be some ground for contending that persons outlawed were not in the contemplation of the act; but, in Lord Mansfield's time this court expressly declared its unanimous opinion on two different occasions (33), that an outlaw fell within the clause of the then existing act (34), the terms of which exactly corresponded with the present. We hold ourselves bound by that opinion, and think that we must discharge the present rule." In the present case, the application must be to charge the party in execution upon the judgment in the action: there is nothing on the face of the return to the habeas corpus to warrant his being charged in execution upon the *capias utlagatum*—a thing unheard of. And there clearly is no pretence for charging one in execution upon a judgment from the consequence of which he is relieved by a competent authority. If, therefore, this is an application to charge the defendant upon the original judgment in the action, the answer is that he is discharged therefrom by the adjudication of the commissioners of the insolvent debtors court; if upon the *capias utlagatum*, then the answer is, that there is no process upon which he *can* be charged in execution.

F. Kelly, contra.—After the case of *The Queen v. The Commissioners of the Insolvent Debtors Court*, it cannot be contended that the insolvent court have not power to discharge an outlaw. But, though that court may discharge him from the debt upon which the outlawry is founded (and consequently from the costs), they cannot relieve him

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(33) *Castleman's Case*, 4 Burr. Burr. 2127.
2119, and *Rex. v. Castleman*, 4 (34) 5 Geo. 3, c. 41.

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from the outlawry itself; at all events, not without the consent of the Crown. The sole foundation for the argument on the other side, is, the somewhat loosely reported expressions of Lord Denman in that case. There is nothing in the insolvent debtors act to deprive the Crown of its right to claim the goods of the outlaw (35), or to give the commissioners power to annul the process of outlawry.

TINDAL, C. J.—The question before us in this case may, as it seems to me, be decided upon a very short ground. The defendant has been brought before us by habeas corpus: and it is sought to charge him in execution. Now, the defendant can only be charged in execution upon a judgment: and from the judgment in this action, it appears, the defendant has been discharged by the insolvent debtors court, as far as their power to discharge him extends. It has been contended before us, that the defendant, being an outlaw, could only be heard upon a motion to reverse the outlawry. But that is not the question now before us. It has further been contended, that, though the insolvent debtors court might discharge the party from the original judgment, they had no power to discharge him from the consequences of the outlawry. But it seems to me that the late case of *The Queen v. The Commissioners of the Insolvent Debtors Court*, 3 N. & P. 543, has put an end to all doubt upon that

(35) See the 1 & 2 Vict. c. 110, s. 103, which enacts, "that this act shall not extend or be construed to extend to discharge any prisoner with respect to any debt due to her majesty, or her successors, or to any debt or penalty with which he shall stand charged at the suit of the Crown, or of any person for any offence committed against any act or acts of parliament relative to

any branch of the public revenue, or at the suit of any sheriff or other public officer, upon any bail-bond entered into for the appearance of any person prosecuted for any such offence, unless three of the commissioners of her majesty's treasury for the time being shall certify under their hands their consent to such discharge."

point. The court of King's Bench there considered the question not to be an open one. The words of the insolvent debtors act, independent of any decided case, seem to me to be amply large to empower the commissioners to award that the defendant be discharged from the original judgment in the action: and that being gone, there remains nothing upon which the party can be charged in execution. I am of opinion that sufficient cause has been shewn against this application. It is unnecessary to go further.

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BOSANQUET, J.—The case has been argued on the part of the plaintiff as if this had been in the nature of an application to discharge the defendant from the outlawry. That, however, is not the question before the court. The defendant is brought up in order that he may be charged in execution: when brought up he is entitled to be heard in opposition to his being so charged. It appears that the defendant was proceeded against to judgment in the original action, that the bail were sued, that the defendant surrendered, and afterwards obtained his discharge under the insolvent debtors act. By that discharge the debt which was the foundation of the judgment is gone. Nothing, therefore, remains upon which to charge him in execution.

COLTMAN, J.—I am of the same opinion. The judgment in the original action being gone by the adjudication of the commissioners of the insolvent debtors court, there is no ground for charging the defendant in execution. The plaintiff seeks to charge him upon the *capias utlagatum*: but no authority has been shewn for that course of proceeding. Besides, we cannot charge a party in execution upon something that is not returned to us as a cause of detainer.

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ERSKINE, J.—The effect of the adjudication of the commissioners of the insolvent debtors court is, to relieve the defendant from imprisonment under the judgment: the plaintiff is in effect seeking to render the adjudication abortive. The cases cited shew that the fact of a prisoner being an outlaw does not prevent his discharge under the act.

Rule discharged.

Wilde, Serjeant, prayed that the prisoner might be forthwith discharged, contending that the court had no power to remand him, inasmuch as the return to the habeas corpus disclosed no legal ground for detaining him.

Kelly conceded that this could not be opposed, but he suggested that the defendant should undertake to bring no action.

Wilde, Serjeant, declined to give such undertaking.

PER CURIAM.—The return shewing no justifiable cause for detaining the defendant, all we can do is to order that he be discharged.

The prisoner was accordingly discharged.

Wednesday,
Nov. 5th.

The court refused to allow judgment to be signed against the casual ejector (in an action to recover a piece of land taken in by road commissioners), upon an affidavit of service on one of the commissioners, and upon their clerk.

DOE d. WHITE v. ROE.

THIS was an action of ejectment brought for the recovery of a strip of land alleged to have been illegally taken in to a road by the commissioners.

Robinson moved for judgment against the casual ejector, upon an affidavit of service of the declaration and

notice upon one of the commissioners, and also upon their clerk.

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TINDAL, C. J.—Ejectment does not seem to me to be the proper remedy. It cannot be said that the commissioners are tenants in possession of a highway: they have hardly so much possession as have the people who use the road.

The rest of the court concurring—

Rule refused.

In re ANN COVERLEY.

Wednesday,
Nov. 6th.

BERE moved that direction might be given to the officer to file an acknowledgment of a married woman under the statute 3 & 4 Will. 4, c. 74, s. 85. The parties were living in Van Diemen's Land. The certificate itself was regular; but there was no positive affidavit that the lady was of full age, the deponent merely pledging his belief.

A certificate of an acknowledgment by a married woman cannot be filed without a positive affidavit that she is of full age.

TINDAL, C. J.—There must be a positive affidavit of the fact: there can be no difficulty in obtaining such an affidavit from some person here; and, upon producing it, they may be filed of record.

Fiat (36).

(36) To meet the special circumstances of the case, the court, on one occasion, directed the commissioners for taking the acknowledgment of a married woman (an infant) in their certificate made in pursuance of the 3 & 4 Will. 4, c.

74, s. 84, to omit the words "of full age." In re Sarah Lake, 1 Scott, 80.

The affidavit may be filed subsequently to the filing of the certificate. Anonymous, 1 Scott, 52.

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*Saturday,
Nov. 9th.*

In trover by the assignees of bankrupts to recover the value of goods alleged to have been delivered to the defendants in contemplation of bankruptcy, evidence that the goods were delivered in payment and satisfaction of a debt due from the bankrupts to the defendants, does not support a plea alleging that the goods were *bonâ fide* sold and delivered to the defendants by the bankrupts before the issuing of a fiat and without notice of an act of bankruptcy, and that the defendants *bonâ fide* paid for them.

Evidence that other creditors of the bankrupts to whom goods had been delivered under similar circumstances, had subsequently given them up to the assignees or paid their value:—Held, irrelevant and inadmissible.

BACKHOUSE, Assignee of BROWN and GRAHAM, Bankrupts,
v. JONES and DEARMAN.

THIS was an action of trover for goods. The first count of the declaration alleged the goods to have been the property of the bankrupts, and charged a conversion before the bankruptcy: the second count alleged the same goods to have been the property of the plaintiff as assignee, and charged a conversion after the bankruptcy.

The defendants pleaded—first, not guilty, to the whole declaration.

Secondly, to the first count, that the bankrupts were not possessed.

Thirdly, to the first count, that the goods were not the property of the plaintiff as assignee.

Fourthly, to the second count, that the plaintiff was not possessed as assignee.

Fifthly, to the first count, that the goods in that count mentioned were *bonâ fide* sold and delivered to the defendants by Brown & Graham before any fiat issued, or any notice given that any act of bankruptcy had been committed; that the defendants *bonâ fide* paid 339*l.* 9*s.* for the same; and that no tender of that sum had been made by the plaintiff; wherefore the defendants detained the goods, &c.

Sixthly, to the second count, the same as the fifth plea.

Seventhly, as to so much of the first count as related to the conversion of certain of the goods (enumerating them), of the value of 23*l.* 13*s.*, that the defendants paid to Samuel Gascoigne, the assignee of the bankrupts before the appointment of the plaintiff, the said sum of 23*l.* 13*s.*, in full satisfaction of the said grievances.

Eighthly, as to so much of the second count as related to the conversion of similar goods as in the introductory part of the seventh plea mentioned, the same as that plea.

The plaintiff joined issue on the first, second, third, and fourth pleas; and replied to the fifth, that the goods in that plea mentioned were not *bonâ fide* sold to the defendants without notice of an act of bankruptcy; and the same to the sixth plea; upon both of which issue was joined.

To the seventh and eighth, that the defendants did not pay the said sum of 23*l.* 13*s.* to the said Samuel Gascoigne in satisfaction of the grievances in the introductory part of those pleas mentioned: issue thereon.

The cause was tried before Alderson, B., at the Liverpool Spring Assizes, 1839. The facts were as follow:—Brown & Graham, the bankrupts, had been in the course of purchasing largely from the defendants and others unfinished cotton goods, and finishing them for the market—paying at the end of one month for the goods bought in the course of the preceding month. In December, 1836, there was a balance due from Brown & Graham to the defendants of 339*l.* 9*s.* Repeated applications had been made for payment of this balance, but without success; and eventually, towards the close of January, 1837, the defendants agreed to take goods in satisfaction of their debt, which had previously been repeatedly offered by Brown & Graham. Accordingly, on the 1st February, goods (nearly the whole of which had originally been obtained from the defendants) to the value of 363*l.* 2*s.* were handed over to the defendants. An invoice was sent with the goods, and the defendants were debited in Brown & Graham's books with the balance, 23*l.* 13*s.*

A fiat issued against Brown & Graham on the 6th March, 1837, and the plaintiff was appointed assignee on the 27th. Between the issuing of the fiat and the appointment of the plaintiff as assignee, viz. on the 17th March, Gascoigne, the provisional assignee, received from the defendants the balance of 23*l.* 13*s.* This action was not commenced until March in the present year.

On the part of the plaintiff, it was contended that the

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transaction in question amounted to a fraudulent preference: and evidence was given, that, on numerous occasions, the bankrupts had sent to creditors goods in satisfaction of debts which they were unable to discharge, on some occasions in consequence of pressure, on others (particularly in the case of one Kirby) without any. The plaintiffs then proposed to shew that several of the parties who had so received goods in satisfaction of their debts, had, upon the application of the assignee (towards the close of 1838), either restored the goods or paid their value.

Ruling as to the
 evidence.

This evidence was objected to on the part of the defendants; but the learned Baron ruled it to be admissible to shew the nature of the transactions between the bankrupt and those several creditors, which were relied upon for the plaintiff as acts of bankruptcy, previous to the delivery of the goods to the present defendants.

Evidence was given of the demand of the goods, and of an offer to restore the 23*l.* 18*s.* paid by the defendants to Gascoigne.

For the defendants, it was submitted that the delivery of the goods by the bankrupts to the defendants was equivalent to a money payment, and within the principle established in *Cannan v. Wood*, 2 M. & Welsby, 465, viz. that a delivery of goods *bonâ fide* made in part payment of a previous debt, after a secret act of bankruptcy committed by the debtor, is a *payment* protected by the 82nd section of the 6 Geo. 4, c. 16.

Summing up.

The learned Baron left it to the jury to say whether or not the goods in question were delivered over to the defendants by the bankrupts voluntarily (that is, without previous pressure,) and in contemplation of bankruptcy; and whether the goods delivered by the bankrupts to Kirby were in like manner delivered voluntarily and in contemplation of bankruptcy: telling them, that, in his opinion the delivery of the goods in question could not under the circumstances be considered a *payment*, so as to bring the case within that of *Cannan v. Wood*.

The jury found both points in the affirmative, and accordingly returned a verdict for the plaintiffs—damages 339*l.* 9*s.*

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Alexander, in Easter Term last, moved for a new trial, on the grounds of the improper reception of evidence, misdirection, and that the verdict was against evidence.—He submitted that the fact of the several creditors alluded to having abstained from insisting upon their right to retain the goods that had been delivered to them, was not evidence; that it was *res inter alios*; and that, had verdicts and judgments been obtained against those parties, even these would not have been evidence on the present occasion.—Then, this was clearly a payment, within the principle of *Cannan v. Wood*. The circumstances of that case are hardly to be distinguished from those of the present: the bankrupt being indebted to the defendants, and repeatedly pressed for payment, in consequence of such pressure delivered to the defendants goods in part payment of their debt: and this was held to be a transaction protected as a *payment* by the 6 Geo. 4, c. 16, s. 82. Lord Abinger there said: "It did not appear that there was any fraud on the part of the creditor, or that he had any knowledge of the act of bankruptcy, and these goods were delivered by the debtor, alleging that he could not raise the money, but was willing to pay part in goods, if the other would receive it, which he did, intending to take the remainder at a future period; and the question is, whether, under these circumstances, what was done was *bonâ fide* done. We cannot suppose the debtor did not mean it as part payment, or that the creditor did not mean to take it as part payment; it is therefore within the act." Parke, B., said: "There are no words [in s. 82] which say it shall be a payment in money; it may be in money or money's worth; the case, however, does not rest only on that, for, we have the authority of Lord Kenyon, in the case of *Wilkins v.*

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Casey, 7 T. R. 713, for saying that a payment in goods is a payment within the statute 1 Jac. 1, c. 15, s. 14; and the question being reduced to this, it is clear on the evidence that these goods were delivered in the way of payment; so that they never could have been made the subject of an action for goods sold and delivered on the part of the bankrupt, because the parties applied for *payment* to the bankrupt, and agreed it was to be taken in goods." And Alderson, B., said: "It seems to me that this was a payment legally and *bonâ fide* made. Whether it was legally made would depend upon this—whether the goods were delivered and taken under such circumstances as, in point of law, would amount to a payment of the debt, so that a party could have pleaded it as a payment; if it could only be pleaded as a set-off, that would not be sufficient. But, if it is to be taken as a part payment, and that part of the debt is therefore wiped off, then it was pleadable as a payment. That appears to be the real criterion to be applied to the case in the court of Common Pleas." (37) So, here, the goods were delivered to the defendants upon pressure, and for the *bonâ fide* purpose of extinguishing their debt. The learned judge ought to have told the jury that the fifth and sixth pleas were proved.—To constitute the transaction a fraudulent preference in contemplation of bankruptcy, there must be a total absence of pressure on the one side, and a voluntary transfer on the other: upon this the evidence [the main points of which were recapitulated and commented upon] clearly did not warrant the conclusions drawn from it by the jury.

TINDAL, C. J.—The case relied on (*Cannan v. Wood*) may be very good law, but it does not fit the defendants' pleas—fifth and sixth (38). The mere delivery of goods in can-

(37) *Carter v. Breton*, 4 M. & P. 424, 6 Bing. 617. evidence of constructive *payment* was given under a plea corresponding

(38) In *Cannan v. Wood*, the with the third plea in this case.

cellation of a debt, is not a sale of goods as alleged in those pleas: there was nothing like a payment. The whole evidence was fairly before the jury. We therefore see no reason for granting a rule as for misdirection or for a verdict against evidence (39). But, upon the other point, viz. the improper reception of the evidence of the restoration of the goods by other creditors to whom they had been delivered in the same way as the goods in question to the defendants, we entertain some doubt. As to that, therefore, the rule may go.

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Cresswell and *Tomlinson* shewed cause.—The evidence in question was clearly admissible as acts done, which are always admissible if relevant to the matter in issue—*Wright v. Doe d. Tatham*, 7 Ad. & E. 313, 2 N. & P. 305. This, like the evidence tendered in *Sharp v. Newsholme*, ante, p. 21, was a link in the chain of proof. There, in trover by assignees for goods claimed by them as belonging to the bankrupt, or as being in his order and disposition at the time of his bankruptcy, with the consent of the true owner, the defendants offered in evidence declarations made by the bankrupt before his bankruptcy, as to the goods in question, in the absence of the plaintiff, in order to shew an exercise of dominion over them by him as owner: this evidence having been rejected, and the jury having found for the plaintiff, this court sent the cause down to a new trial.

Evidence admissible.

Alexander and *Cowling*, in support of the rule.—The acts of third parties wholly unconnected with the defendants, and done nearly two years after the transaction now in question took place, cannot upon any principle of law be held to form part of the *res gestæ*: even so to constitute the acts of the bankrupt himself, they must appear to have

Evidence improperly received.

(39) Alderson, B., was satisfied with the verdict.

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been done within a much shorter period of the transaction they are intended to affect. In *Wright v. Doe d. Tatham*, Parke, B., says (7 Ad. & E. 388): "The conclusion at which I have arrived, is, that proof of a particular fact, which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible." Upon the principle laid down in that case, and in *The Queen v. Turner*, Moody's C. C. R. 347, the evidence in question, though good as against the parties themselves, was clearly inadmissible as against the present defendants.

Cur. adv. vult.

BOSANQUET, J., now delivered the judgment of the Court:—This was an action of trover tried before my Brother Alderson at Liverpool at the last Spring Assizes, when a verdict was found for the plaintiff.

Mr. Alexander moved for a new trial upon three grounds—first, for the improper rejection of evidence—secondly, on the weight of the evidence given at the trial—thirdly, for misdirection of the judge.

The court refused to grant any rule upon either of the two last points; and the only question now remaining for judgment, is, whether certain evidence given by the plaintiff was improperly received. The plaintiff sought to recover the goods in question from the defendants upon two grounds—first, that acts of bankruptcy had been committed prior to the time when the goods came into the hands of the defendants—secondly, that the delivery of the goods to the defendants was made by way of voluntary preference in contemplation of bankruptcy, which subsequently took place.

The plaintiff endeavoured to prove the prior acts of

bankruptcy by shewing the delivery of goods to various creditors of the bankrupts: and on this part of his case he tendered evidence to prove that those creditors after the fiat had issued returned the goods received by them, or their value, to the attorney under the fiat. This evidence was objected to, but received as tending to shew the nature of the transactions between the bankrupts and the creditors upon which the plaintiff relied as acts of bankruptcy previous to the delivery of the goods in question to the defendants.

The case was heard before my Brothers Coltman and Erskine and myself, in the absence of the Lord Chief Justice: and we are of opinion that the acts of the creditors, after the fiat had issued were not receivable in evidence to affect the defendants. The only way in which their conduct bore upon the case, was, by shewing their conviction that they had received the goods under circumstances which did not entitle them to keep possession. But any declaration of their opinion made by themselves after the fiat, however clearly expressed, could not have been received in evidence: consequently, evidence of acts done by them, adduced for the purpose of raising an inference respecting the previous intentions either of themselves or of the bankrupts, must be inadmissible.

The jury found that the delivery of the goods in question to the defendants was both voluntary and in contemplation of bankruptcy: but, if the evidence given upon the other part of the case was improperly received, the verdict cannot stand; for, it is impossible to say that it may not have had an effect on the jury in coming to their conclusion respecting the transaction with the defendants.

We think, therefore, that the rule for a new trial must be made absolute.

Rule absolute.

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One C. rented a farm under the plaintiff, his term in which expired on the 1st February, 1838. On the 2nd February, the plaintiff's agent demanded possession of the land; but C. refused to quit unless paid for certain improvements. The plaintiff thereupon brought an ejectment, and obtained actual possession on the 16th July:—Held, that the demand of possession on the 2nd February, gave the plaintiff such a constructive possession as to enable him to maintain trespass against third persons for coming on the land and carrying off the crops.

In trespass

for breaking and entering the plaintiff's close, and carrying away hay, the defendants pleaded that the alleged trespasses were committed by them jointly with one C., and that afterwards certain disputes were pending between C. and the plaintiff concerning claims of C. against the plaintiff in respect inter alia of the farm occupied by him under the plaintiff, and concerning claims by the plaintiff against C. *in respect of the causes of action in the declaration mentioned*, and that the plaintiff then agreed to release C. from all claims, and did accordingly relinquish all claim against him *in respect of the said causes of action*:—Held, that this plea was sustained by proof of an agreement whereby the plaintiff, in consideration that C. (who had been tenant of a farm under the plaintiff, and had held over the same under colour of a claim for improvements) acknowledged that he had no claim against the plaintiff, the plaintiff "relinquished all claims against C. *for mesne profits* and rent, or for holding over"—the action being substantially an action for *mesne profits*.

The premises were held by C. according to certain written rules, but the length of the term was agreed by parol:—Held, that it was not necessary to produce the written rules.

HEY v. MOORHOUSE and Three Others.

THIS was an action of trespass. The declaration stated that the defendants, on the 9th July, 1838, and on divers other days and times between that day and the commencement of this suit, with force and arms &c., broke and entered divers, to wit, three closes of the plaintiff, situate and being respectively *in the parish of Calverley*, in the county of York, that is to say, &c.; and then forced and broke open, broke to pieces, damaged, and spoiled divers, to wit, two gates, &c., &c.; and with feet in walking trod down, trampled upon, and consumed and spoiled the grass, corn, and hay of the plaintiff, of great value, to wit, of the value of 200*l.*, there then growing and being; and with cattle, to wit, horses &c., eat up and depastured other the grass, corn, and hay of the plaintiff, of great value, to wit, of the value of 100*l.*, then growing and being in the said closes respectively; and with divers other horses &c., and also with the wheels of divers carts, waggons, and other carriages, crushed, damaged, and spoiled other the grass, corn, and hay of the plaintiff, of great value, to wit, of the value of 100*l.*, there then also growing and being; and with the feet of the said horses &c., and with the wheels of the said carts &c., tore up, subverted, damaged, and spoiled the earth and soil of the said closes respectively; and also then mowed and cut down divers, to wit, one

thousand acres of the corn and grass of the plaintiff then growing and being in the said closes respectively; and then seized, took, and carried away the hay, grass, and corn, to wit, &c., of the plaintiff, of great value, to wit, of the value of 500*l.*, off and from the said closes respectively, and converted and disposed of the same to their own use &c.

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The defendants pleaded—first, not guilty—secondly, that the plaintiff was not in possession at the time of the alleged trespasses—thirdly, that the alleged trespasses were all committed by the defendants jointly with one George Cooke, and that afterwards, to wit, on the 24th July, certain disputes were pending between George Cooke and the plaintiff concerning claims of Cooke against the plaintiff in respect (inter alia) of the farm occupied by him under the plaintiff, and concerning claims by the plaintiff against Cooke in respect of the causes of action in the declaration mentioned, and that the plaintiff then agreed to release Cooke from all claims, and did accordingly relinquish all claim against him in respect of the said causes of action.

Second plea.

Third plea.

Issue was joined on the first and second pleas, and to the third the plaintiff replied—that the said George Cooke did not enter into nor make the said agreement with the plaintiff in the last plea mentioned, nor did the plaintiff accept the said agreement therein mentioned from the said George Cooke, in full satisfaction and discharge of the trespasses and causes of action in the declaration mentioned, and of the damages by the plaintiff sustained by reason thereof, in manner and form as the defendants had in their said last plea in that behalf alleged. Issue thereon.

Replication to the third plea.

The cause was tried before Parke, B., at the last Spring Assizes for the county of York. The facts that appeared in evidence were as follow :—George Cooke was the occupier of a farm at Pudsey under the plaintiff. His tenancy commenced on the 2nd February, 1836, under a

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parol agreement made with the plaintiff's agent, by which the length of the term was ascertained, but the terms of the holding had reference to certain rules under which the former tenant held; these rules were in writing, but the writing was not produced. The farm at Pudsey was the only farm held by Cooke under the plaintiff. On the 29th July, 1837, Cooke received from the plaintiff's agent a notice to quit the farm on the 2nd February, and the barns on the 1st May, 1838. He, however, held over (though possession was duly demanded on the 2nd February), claiming something for management and improvements. The precise nature of this claim did not appear.

Ejectment.

The plaintiff brought an action of ejectment to recover possession of the farm. The action was tried on the 12th July, 1838: it was undefended; judgment was signed on the 14th, and the writ of possession was executed on the 16th of that month. In the declaration in ejectment the premises were described as being *in the parish of Pudsey*.

Whilst the ejectment was pending, viz. on the 27th June, Cooke advertized a sale of his effects; and, amongst other things, ten acres of hay. On the day of the sale the plaintiff's agent attended, and read and distributed the following notice:—

Notice.

“Take notice that the farm at Rooker Lane in Pudsey, the possession of which George Cooke holds over adversely and unlawfully against his landlord, together with all the growing crops thereon, is and are the property of William Hey, Esq.; and that the said George Cooke is not, nor is any other person, authorized by the said William Hey to sell the same crops, or any part thereof: and also, that, in case any sale thereof shall be made in pursuance of a public notice of an intended sale thereof by auction on Wednesday, the 27th June instant, such sale will be deemed to be illegal and fraudulent, and proceedings will be taken to set the same aside accordingly: And further, take notice that instructions have al-

ready been sent to London to file a bill in Chancery for obtaining an injunction to prevent such sale from taking place; and that, not only the said George Cooke and his auctioneer, but every person who shall bid at such sale or become the purchaser of any part of such crops, will be made a party to such suit in Chancery, and proceeded against accordingly: and all persons are hereby discharged from and warned against purchasing any part of the said crops, and that, if they do so, it will be at their own peril; and the said George Cooke, and every other person acting for him, or by his authority, is hereby discharged from selling or attempting to sell any part of the same crops accordingly."

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This notice bore date the 26th June, 1838, and was signed by the plaintiff's solicitors, and addressed "to George Cooke of Pudsey, and to Mr. C. Morris, Auctioneer, and all others whom it may concern."

In consequence of this notice, the sale did not then take place: but the hay in question was afterwards, viz. on the 9th July, purchased and carried away by the defendants.

The record of the judgment in ejectment was then put in, and an application was made to the learned Baron to amend the declaration, by altering the parish from Calverley to Pudsey, to make it agree with that record; but his lordship refused to allow it, inasmuch as there was no variance between the record and the evidence.

On the part of the defendants, it was submitted that the plaintiff must be nonsuited, on the grounds that there was no proof of title or possession in Hey, and that the rules ascertaining the terms of the holding ought to have been produced.

Application for
 nonsuit.

The learned Baron was of opinion that the record of the judgment in ejectment was inapplicable; but that the entry of the plaintiff's agent on the 2nd February, 1838, was sufficient to re-vest the legal possession in the plaintiff,

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thinking that the term ended on the 1st: or, if not, that the entry on the day of the sale was to be referred to a legal right, and was sufficient to vest the possession in the landlord, so as to enable him to maintain trespass—referring to Co. Litt. 245. b. He also thought, that, on the evidence, it must be taken that the time of holding was wholly independent of the rules which governed the former tenant, and therefore it was not necessary to produce them: and he directed the cause to proceed.

Release of
 Cooke.

In support of the third plea, the defendants proved the following release, which was given by the plaintiff to Cooke on payment by the latter of a sum of 30*l.*:—

“I, the undersigned George Cooke, do hereby acknowledge that I have no claim or demand whatsoever against William Hey, Esq., for or in respect of my farm at Pudsey lately occupied under him, or for or in respect of any notices or proceedings whatsoever taken by him in order to obtain possession of the same farm held over by me, and in order to prevent the wrongful removal by me of the crops growing thereupon. And, in consideration of the foregoing undertaking, I, the undersigned William Hey, do hereby relinquish all claims against the said George Cooke for mesne profits and rent, or for holding over the said farm. Witness our hands the 24th July, 1838.”

“(Signed) George Cooke,
 “William Hey.”

Summing up.

The learned Baron thought this was a claim on Cooke and the defendants for mesne profits, and that satisfaction as to one was an answer as to both: but he thought the plea not proved, because, in order to make it a good plea, it must be construed to import that Cooke had a legal claim on the plaintiff, or at least a colourable legal claim—a bonâ fide disputable claim to a legal right in respect of the farm—which would be a good consideration for the agreement, and which he gave up as a consideration for

the plaintiff giving up his claim for mesne profits; and there was no proof of such right or claim.

The jury returned a verdict for the plaintiff—damages 47*l.*, the price of the hay sold.

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Alexander, in Easter Term last, in pursuance of leave reserved to him at the trial, obtained a rule nisi for a non-suit, or to enter a verdict for the defendants upon the third issue, or for a new trial, on the grounds of misdirection, and that the verdict was against evidence.—He submitted that the terms of *Cooke's* holding should have been proved by the production of the rules referred to; and that the agreement of the 24th July, 1838, operating a release of *Cooke* from the consequences of holding over (one of which was the very thing for which this action was brought), placed the defendants in the same situation as if the plaintiff had obtained judgment against *Cooke* and received satisfaction for the present claim.

Cresswell and *Wortley* shewed cause.—The entry by the plaintiff's agent on the 2nd February, 1838, when the tenancy was ended by the notice to quit, or the entry of the same party on the day of the sale, for the purpose of demanding the possession of the premises, were either of them sufficient to re-vest the possession in the plaintiff, so as to enable him to maintain trespass. A landlord, having a right to the possession of premises, may undoubtedly enter; and, if he do enter, he may treat the tenant as a trespasser, and maintain an action, though the possession of the latter was originally rightful. Thus, in *Butcher v. Butcher*, 1 M. & R. 220, 7 B. & C. 399, where a remainderman entered upon a party in possession by intrusion, it was held that trespass lay against the intruder, although he retained the actual possession (40). "There is no

As to the right
 of plaintiff to
 maintain tres-
 pass.

(40) See *Newton v. Harland*, post.

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of Cooke.

doubt," said Lord Tenterden, in that case, "that, if he who has the right enters, he can maintain trespass."

The agreement of the 24th July did not sustain the defendant's third plea. Cooke had held over without any colour of right, after a sufficient notice to quit. He pretended to claim a right to hold possession until the landlord gave him a remuneration for certain improvements he had made. The hay was purchased and carried away by the defendants in defiance of the landlord's notice. There was no attempt on the part of the defendants to shew that there was any foundation for Cooke's claim. The learned judge, therefore, was perfectly right in holding that the agreement did not sustain the plea. Besides, the present action is not brought in respect of any thing that formed the subject-matter of that agreement. The claims the plaintiff by the agreement undertakes to relinquish, are, for mesne profits, for rent, and for holding over. The present action is not brought in respect of either of these claims: but for the trespass committed by the defendants in coming upon the plaintiff's land, and carrying away his hay. There is no pretence for saying that this is substantially an action for mesne profits. The claim for mesne profits arises only where the party is in under a colourable title; and in such action the judgment in ejectment would be evidence: but, as against these defendants, the judgment in the ejectment was clearly not evidence at all.

Production of
the written
rules.

Then, with respect to the terms of the holding, these, as far as they were in issue, were the subject of a verbal agreement; the written rules were wholly unnecessary.

No possession
in plaintiff.

Alexander and W. H. Watson, in support of the rule.—That an entry was necessary to enable the plaintiff to maintain trespass, is not disputed. The only question is whether there was in this case such an entry as to re-vest the possession in the plaintiff before the time of committing the alleged trespass, and to entitle the plaintiff to

treat these defendants as trespassers. Cooke's tenancy expired on the 1st February. On the 2nd, the plaintiff's agent demanded possession of the farm. Cooke, claiming something that was not very intelligible, held over; and, whilst he so continued to hold over, viz. on the 9th July, the defendant purchased the hay in question. Cooke was clearly liable for the mesne profits. As against him, therefore, it may be that there was a sufficient possession in the plaintiff to enable him to maintain trespass. Comyns's Digest, *Trespass*, (B. 2.), (B. 3.): "A plaintiff cannot maintain trespass quare clausum fregit, if he has not actual possession, though he has the freehold in law; as, an heir shall not have trespass against an abator. So, before re-entry, a disseisee shall not have trespass against A. for a wrong done after the disseisin." [*Bosanquet, J.*—Had the plaintiff less possession as against a mere stranger?] In *Liford's Case*, 11 Rep. 51. a., it is said: "If one disseises me, and during the disseisin he cuts down the trees or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him vi et armis for the trees, grass, corn, &c., for, after my regress, the law, as to the disseisor and his servants, supposes the freehold always continued in me; but, if my disseisor makes a feoffment in fee, gift in tail, lease for life or years, &c., and afterwards I re-enter, I shall not have trespass against those who came in by title; for, this fiction of law, that the freehold continued always in me, shall not have relation to make him who comes in by title a wrong-doer vi et armis, for, in fictione juris semper æquitas existit: but, in such case, I shall recover all the mean profits against my disseisor, in the same manner as the disseisee in such cases should recover in an assize at the common law, before the statute of Gloucester, Cap. 1, damages only against the disseisor." [*Erskine, J.*—Cooke was no disseisor.] If there was no disseisin, then Cooke was in possession. But, whatever the plaintiff's right of

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possession as against Cooke, he clearly had no possession, constructive or otherwise, as against these defendants: they are not interested in sustaining Cooke's title. In *Doe d. Burrell v. Perkins*, 3 M. & S. 271, tenant for life, remainder to R. P. in fee; the tenant for life leased for her life, and died in 1799, and the lessee continued in possession without paying rent, till his death in 1805, when his son took possession, and continued without paying rent, and in 1807 levied a fine with proclamations: it was held that the heir of R. P., the remainder-man, might maintain ejectment against the son without an actual entry to avoid the fine, or a notice to determine the tenancy. "It seems," said Lord Ellenborough, "that, in order to constitute a title by disseisin, there must be a wrongful entry; but here has been no wrongful entry, but only a wrongful continuance of the possession, therefore there was no disseisin." [*Erskine, J.*—After the expiration of the time mentioned in the notice to quit, Cooke was a mere tenant by sufferance. The entry by the landlord therefore made him and all coming in by licence from him trespassers.] Undoubtedly an entry by the landlord under the circumstances would give him a right to maintain trespass against the tenant, but not against strangers.

The written
 rules should
 have been pro-
 duced.

The moment it appeared that the holding was regulated by an instrument in writing, the production of that instrument was essential to the establishing the plaintiff's case. In *Cotterell v. Hobby*, 6 D. & R. 551, 4 B. & C. 465, in case for an injury to the plaintiff's reversion in land by cutting and carrying away branches from trees growing on it, it appeared that the land was demised to a tenant by a written agreement: and it was held that the production of this agreement was essential to the plaintiff's right to recover. Bayley, J., there said: "It is a plain rule of law that you cannot give parol evidence of the contents of a written agreement which is still in existence. Here, as it was proved that Morgan (the tenant) held under a written

agreement, the terms of his tenancy could only be proved by the production of the agreement itself." So, in *Fenn d. Thomas v. Griffiths*, 4 M. & P. 299, 6 Bing. 553, in ejectment, one of the plaintiff's witnesses stating, on cross-examination, that he had prepared an agreement or lease in writing between the plaintiff and A. T. (a tenant whom the defendant succeeded), relative to the premises sought to be recovered, and that he had heard the latter say that he held the premises under the plaintiff, but not that he held under the agreement; it was held that the plaintiff was nevertheless bound to produce the agreement. [*Erskine, J.*—Under the second plea, the only question was whether or not the term was ended; and it appears that the length of the term was agreed on by parol. And it was for the defendants to make out the third plea.] Many authorities to the effect of those cited will be found collected in the several opinions delivered in this court in the case of *Strother v. Barr*, 2 M. & P. 207, 5 Bing. 136.

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The agreement produced clearly established the third plea. Cooke was holding the premises in assertion of a claim for improvements; and the plaintiff was claiming in respect of the mesne profits, part of which consisted of the hay for carrying away which this action is brought. By the agreement, the plaintiff, in consideration of Cooke's relinquishing his claim (which, however questionable, was still a sufficient consideration—*Longridge v. Dorville*, 5 B. & Ald. 117), relinquished all claims against Cooke for mesne profits and rent, or for holding over. And in the case of point tort-feasors, a release of one operates a release of all—per Lawrence, J., in *Dufrene v. Hutchinson*, 3 Taunt. 119.

Release of
 Cooke.

Cur. adv. vult.

BOSANQUET, J., now delivered the judgment of the Court:—This was an action of trespass for breaking and entering the plaintiff's close, and damaging the gates and

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fences, and mowing the grass, corn, and hay, and carrying them away.

The defendants pleaded—first, not guilty—secondly, that the plaintiff was not possessed at the time when &c.—thirdly, that the trespasses were committed by the defendants jointly with one George Cooke, and that none of them were committed alone without the said George Cooke; that, after the committing &c., on the 24th July, 1838, certain disputes were pending between the said George Cooke and the plaintiff, amongst other things in respect of a certain farm then lately occupied under the plaintiff, and also touching certain other claims of the plaintiff against the said George Cooke, amongst other things in respect of the causes of action in the declaration mentioned; and thereupon, on the day and year last aforesaid, it was agreed between the plaintiff and the said George Cooke, that he, Cooke, should abandon, and that he did abandon his said claims and demands against the plaintiff, and the plaintiff agreed to relinquish and did relinquish all claims against Cooke in respect of the causes of action in the declaration mentioned, and Cooke then entered into and made the said agreement with the plaintiff, and the plaintiff then accepted the said agreement in full satisfaction and discharge of all the trespasses and causes of action in the declaration mentioned, and of all damages sustained by reason thereof.

The plaintiff joined issue on the first and second pleas, and to the third replied that the said George Cooke did not enter into nor make the said agreement with the plaintiff in the last plea mentioned, nor did the plaintiff accept the said agreement therein mentioned in full satisfaction and discharge of the trespasses and causes of action in the declaration mentioned, and of the damages sustained by reason thereof; whereupon issue was joined.

The cause was tried at the last Lent Assizes for Yorkshire, before my Brother Parke, when it was proved by the

plaintiff's agent that he let a farm to Cooke by parol; his holding to commence on the 2nd February, 1836; and to hold according to rules under which the former tenant held. The rules were in writing, and were not produced, but the length of the term was agreed by parol. Cooke entered into possession on the 2nd February, 1836; and he occupied no other farm under the plaintiff but the farm in question situate at Pudsey. Notice to quit the land on the 2nd February, 1838, and the barns on the 1st May, was proved.

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On the 2nd February, the agent of the plaintiff went on the premises to take possession pursuant to the notice, and required Cooke to give up possession, which he refused. Cooke held over, claiming for management and improvements. The plaintiff resisted his claim and paid nothing, but sent a valuer over. The precise nature of Cooke's claims did not appear. In June, Cooke advertised a sale of his effects, and, inter alia, ten acres of mowing hay. On the day of sale, notice was publicly given that the sale was illegal: notwithstanding which the hay was sold by the authority of Cooke, and the action was brought against the defendants for coming on the premises and taking it away.

Demand of possession.

A verdict having been found, under the direction of the learned judge, for the plaintiff, Mr. Alexander obtained a rule to shew cause why a nonsuit or a verdict for the defendant on the third issue should not be entered, or a new trial be had.

The case was heard, in the absence of the Lord Chief Justice, before my Brothers Coltman, Erskine, and myself. Three objections have been made. The first objection is, that the nature of the tenancy ought to have been shewn by the production of the written rules, according to which it was proved that the tenant was to hold: to which the answer is, that, under the plea denying the possession of the plaintiff, it was only necessary to prove the extent of

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ting of posses-
sion.

the tenant's term; which was proved to have been agreed to by parol, and did not therefore depend upon the written rules.

The second objection is, that the entry of the plaintiff by his agent, either on the 2nd February, or on the 27th June, when the sale took place, was insufficient to revest the possession in the plaintiff, so as to make the defendants trespassers. That the entry of the agent on the 2nd February, when the tenancy expired, for the express purpose of demanding possession, and the demand made accordingly, were sufficient to revest the possession in the plaintiff, was scarcely disputed. The case of *Butcher v. Butcher*, 7 B. & C. 399, 1 M. & R. 220, is decisive on this point; and it is there said that it is not necessary that the party who makes the entry should declare that he enters to take possession: it is sufficient if he does any act to shew his intention. But it is said, that, although the plaintiff might maintain trespass against Cooke, the tenant, he cannot maintain such action against the defendants, who entered by authority of Cooke to purchase the crops of him. And *Liford's Case*, 11 Rep. 51, is cited; in which it is laid down, that, although a disseisee who enters may maintain trespass against the disseisor for acts done before entry, he cannot maintain such action against those who claim by title from the disseisor for acts done by them after the disseisin and before re-entry: and it is contended, that, as the tortious possession of Cooke commenced on the 2nd February, and the acts of the defendants were committed subsequently to that period, they are not liable to be sued as trespassers before a fresh entry by the plaintiff. The answer to this argument is, that there has been no disseisin, nor any title acquired by the defendants from a disseisor. The plaintiff having regained possession of the land by his peaceable entry upon the unlawful possession of his tenant, and being entitled to treat his tenant as a trespasser, all those who came upon the

land without title after such revesting of his possession were trespassers also, and were liable to be sued as such. The two first objections therefore are unfounded.

The third objection is, that the direction of the learned judge with respect to the third issue was not correct. He thought, as he states in his report, that the claim on Cooke and the defendants was a claim for mesne profits, and that satisfaction with regard to one was an answer as to all: but he thought that the plea was not proved, because, in order to make it a good plea, it must be construed to import that Cooke had a legal claim on the plaintiff, or at least a colourable legal claim, that is, a bonâ fide disputable claim to a legal right in respect of the farm, which would be a good consideration for the agreement, and which he gave up as a consideration for the plaintiff giving up his claim for mesne profits: and, as there was no proof of such right or claim, he held that the plea was not proved; reserving the point for the consideration of the court.

The agreement proved at the trial was as follows:—"I the undersigned George Cooke, do hereby acknowledge that I have no claim or demand whatsoever against William Hey, Esq., for or in respect of my farm at Pudsey lately occupied under him, or for or in respect of any notices or proceedings whatsoever taken by him in order to obtain possession of the same farm held over by me, and in order to prevent the wrongful removal by me of the crops growing thereupon; and, in consideration of the foregoing undertaking, I, the undersigned William Hey, do hereby relinquish all claims against the said George Cooke for mesne profits and rent, or for holding over the said farm. Witness our hands the 24th July, 1838."

"Witness

" H. G. Hutchinson.

" T. T. Dible."

"The x mark of

" George Cooke.

" William Hey."

If it were necessary that the pendency of disputes between Cooke and the plaintiff should be proved at the trial,

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it might be necessary that the claims of Cooke should be shewn to be of such a nature as would afford a sufficient consideration for the agreement pleaded. But the existence of the claims as pleaded does not appear to have been put in issue. The plea states that certain disputes were then pending between Cooke and the plaintiff touching and concerning certain claims of Cooke against the plaintiff (*inter alia*) for and in respect of a certain farm then lately occupied under the plaintiff.

The replication, which denies the making of the agreement by Cooke, and the acceptance of it by the plaintiff in satisfaction, admits the existence of disputes touching certain claims of Cooke as pleaded, in respect of a farm lately occupied under the plaintiff. The only farm which Cooke occupied under the plaintiff was proved to be the farm at Pudsey. The agreement produced acknowledges thereby that Cooke then had no claims or demands whatsoever against the plaintiff in respect of Cooke's farm at Pudsey lately occupied under the plaintiff; and, in consideration of this undertaking (that is, of such acknowledgment), the plaintiff agrees to relinquish all claims against Cooke for mesne profits or holding over. This agreement sufficiently shews the understanding of the parties that Cooke had agreed to give up his claims on the plaintiff respecting the farm at Pudsey, whatever those claims might be.

It was objected at the trial that the agreement of the plaintiff to relinquish all his claims for mesne profits or holding over, did not extend to the trespasses in question. The learned judge, however, thought that the action was substantially brought for mesne profits, and consequently that the agreement did extend to the trespasses in question; in which opinion we agree with him. He further thought, that, supposing the plea to be good, it must be construed to import that the claims of Cooke which he agreed to abandon, were legal, or at least colourably legal claims; in

which opinion we also agree, for, we think, that, upon a general demurrer, the plea would be so construed.

But the express ground upon which he directed the jury to find the third issue for the plaintiff, was, that no evidence was given that the claims of Cooke were of such a nature as the plea imported. It appears to us, however, that no such proof was necessary upon the issue joined, the existence of Cooke's claims as pleaded being admitted on the record. The allegation contained in the plea, and admitted by the replication, was, that Cooke had claims, that is, legal or fairly disputable claims, touching a farm occupied under the plaintiff; and the only farm occupied by Cooke under the plaintiff, was, the farm at Pudsey; and, as it was proved that both parties executed an agreement, by which the plaintiff agreed to relinquish his claims to mesne profits, in consideration of the undertaking contained in that agreement, by which Cooke gave up all his claims on the plaintiff respecting his farm at Pudsey, we think the jury ought not to have been directed to find the third issue for the plaintiff, for want of proof of the nature of Cooke's claim.

The point having been reserved by the judge, the consequence is that the rule for entering a verdict on the third issue must be made absolute, and the rest of the rule discharged.

Rule accordingly.

HARWOOD, Assignee of CREED, a Bankrupt, v. BARTLETT.

Saturday,
Nov. 9th.

THIS was an action of trover brought by the plaintiff as assignee of one Creed, a bankrupt, to recover from the de-

Goods were sold
by the defend-
ant as agent of
one C., in con-

templation of C.'s bankruptcy, for the purpose of raising money for the benefit of the defendant and C., and defrauding C.'s creditors. The purchasers paid a fair price for the goods, and were not parties to or in any way cognizant of the fraud;—Held, that a sale effected under such circumstances did not constitute an act of bankruptcy.

Held also, that the handing over to the defendant by C. of blank delivery orders for part of the goods, which were in a public warehouse, was not a gift, delivery, or transfer of the goods to the defendant, within the 6 Geo. 4, c. 16, s. 2, the defendant being merely the agent of the seller.

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fendant the value of certain goods sold by the defendant as the agent of Creed.

The defendant pleaded—first, not guilty—secondly, that the plaintiff was not lawfully possessed as assignee—thirdly, that, two months before the issuing of the fiat, the defendant, by the authority and as agent of Creed, sold the goods, and that he had no notice of any act of bankruptcy committed by Creed.

The plaintiff joined issue on the first and second pleas, and replied *de injuriâ* to the third.

The cause was tried before Maule, B., at the last Spring Assizes for Somersetshire. The bankruptcy of Creed was admitted, and the following facts given in evidence:—Creed, the bankrupt, and Bartlett, had formerly been in partnership together. On their dissolution, the former was indebted to the latter in a large sum, of which 200*l.* were payable in September, 1837, and 400*l.* some time in 1838. Bartlett calling for payment of the 200*l.*, Creed disclosed to him the desperate state of his affairs, and in particular informed him that he was in expectation of being brought to a stand by an Exchequer process for some smuggling transactions he had been engaged in. It was arranged between these two, that Creed should get together as many goods as he could on credit, and that Bartlett (who was then travelling for a London house) should dispose of them; the surplus, after payment of Bartlett's debt, to form a purse for Creed. At this time, Creed had a shop at Shepton Mallett. He had 200*l.* worth of butter in a warehouse at Bristol, for which he gave Bartlett a blank delivery order. These were accordingly sold by Bartlett to one Merewether, at Bridgewater, on the 7th September; and a parcel of sugars, which had been purchased from the plaintiffs by Creed, were on the 29th October also sold by Bartlett to one Fuller, a grocer at Bridgewater: the sum realized by these sales was more than sufficient to satisfy Bartlett's debt. The sugars were never in the possession of Creed,

but went direct from the plaintiffs' warehouse to Fuller's. The purchasers of the goods were not parties to or in any way cognizant of the fraud, but paid a fair price for them. Early in November a fiat issued against Creed.

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The plaintiff relied upon these sales by Bartlett as constituting acts of bankruptcy, within the 3rd section of the 6 Geo. 4, c. 16, which enacts, amongst other things, that, if 6 Geo. 4, c. 16, s. 3. any trader shall "make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or *make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels,*" with intent to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy.

On the other hand, it was insisted, that, the *purchasers* being no parties to the fraudulent design of Creed, the sales were not acts of bankruptcy; for which proposition *Baxter v. Pritchard*, 1 Ad. & E. 456, 3 N. & M. 638, was relied on.

It was further contended, on the part of the plaintiff, that, in the case of the butters at least, there was a complete transfer or delivery to Bartlett, as far as the nature of the article would permit; and that that at all events constituted an act of bankruptcy. To which it was answered that there was no transfer of the butters until the delivery order was filled up with the name of the vendee.

The learned Baron told the jury, that, if any sale was Summing up. made by the defendant and Creed with the view to defeat or delay the creditors of Creed, and such sale was fraudulent *on the part of the buyer*, it was an act of bankruptcy, and that the defendant would be liable for that sale and for all subsequent matters in which he assisted: but that such sale was not an act of bankruptcy, unless *the buyer knew the sale to be fraudulent*.

The jury found that the buyers had no knowledge of any

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fraud on the part of the vendor; and consequently a verdict was entered for the defendant.

Erle, in Easter Term last, obtained a rule nisi for a new trial, on the ground of misdirection.—He relied on *Cumming v. Bailly*, 4 M. & P. 36, 6 Bing. 363, where it was held that a fraudulent delivery or transfer of a bill of exchange constituted an act of bankruptcy within the 6 Geo. 4, c. 16, s. 3, although the person intended to be thereby benefited was no party to the fraud.

Bompas, Serjeant, shewed cause.—*Cumming v. Bailly* was the case of a fraudulent preference: this was the case of a bonâ fide purchase. In *Rose v. Haycock*, 3 N. & M. 644, n., 1 Ad. & E. 460, n., a fair and bonâ fide sale of the whole of a trader's property was held not to be of itself an act of bankruptcy. And in *Baxter v. Pritchard*, 1 Ad. & E. 456, 3 N. & M. 638, it was held that an assignment by a trader of his whole stock, with intent to abscond from his creditors, and carry off the purchase money, is not an act of bankruptcy, where the purchaser pays a fair price for the goods, and is ignorant of the trader's design. Lord Denman, in delivering the judgment of the court of King's Bench, referring to *Hill v. Farnell*, 9 B. & C. 45, says: "The incongruity would, indeed, be monstrous if the purchaser were to be at liberty to keep goods so obtained, if a previous act of bankruptcy had been committed; but that, if no previous act of bankruptcy had been committed, he should be disabled from keeping goods, and even from recovering a dividend on the price he had bonâ fide paid (41).

(41) In this part of the judgment in 1 Ad. & E. 643, there is evidently a typographical error. The sentence stands thus: "The incongruity would, indeed, be monstrous if the purchaser were to be at

liberty to keep goods so obtained, but should be disabled from even recovering a dividend on the price he had bonâ fide paid, if no previous act of bankruptcy had been committed."

Another great inconvenience was forcibly pointed out: as the transfer and delivery of *any part* of the property may be by the statute an act of bankruptcy, a trader carrying on business in the ordinary way might be made a bankrupt by a regular sale in his shop, by proof, subsequently obtained, that he had formed a scheme for cheating his creditors of the money; and in that case the unfortunate purchaser must both yield up to the assignees the article bought, and lose his right of proving under the commission. These startling consequences (which would perhaps warrant some degree of violence to the wording of a law) will be avoided by confining the epithet 'fraudulent' to the gift, transfer, or delivery of *the goods*, and not extending it to the projects which possibly the trader may entertain as to the disposal of *the purchase-money*." [The Court called on—

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Erle and *Butt* to support the rule.—To make a transfer fraudulent, it is not necessary that the transferee should be a party to or in any way cognizant of the fraud, for, whether he be so or not, the transaction is equally against the policy of the bankrupt laws. The case of *Baxter v. Pritchard* is widely distinguishable from the present: there, the sale was *bonâ fide*, and the payment protected by the 6 Geo. 4, c. 16, s. 82, and therefore it could not amount to a fraudulent *delivery*—*Coles v. Robins*, 3 Camp. 183; here, the question arises between the assignees and the man who was *a party to the fraud*, and who therefore stands in a very different situation from the innocent purchaser. And the case of *Baxter v. Pritchard* is irreconcilable with that of *Cumming v. Bailey*, 4 M. & P. 36, 6 Bing. 363. In *Devas v. Venables*, 3 New Cases, 400, 4 Scott, 123, it was held that a payment for goods purchased of a bankrupt just before his bankruptcy, is not protected by the 6 Geo. 4, c. 16, s. 82, if the purchaser knows of the bankrupt's circumstances, or has means of knowing them of which he

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does not avail himself (42). In *Cook v. Caldecott*, M. & M. 552, it was the *buyer* that was sought to be charged. At all events, as regards the butters, there was a *fraudulent delivery* to the defendant, he having the control over them by means of the blank delivery order.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—This was an action of trover brought by the assignee of one Creed, a bankrupt, to recover from the defendant the value of certain goods sold by the defendant as the agent of Creed.

The defendant pleaded—first, not guilty—secondly, that the plaintiff was not lawfully possessed as assignee—thirdly, that, two months before the fiat issued, the defendant, by authority and as agent of the said bankrupt, sold the said goods, and that he had no notice of any act of bankruptcy committed by Creed.

Issue was joined upon the first two pleas, and the general replication *de injuriâ &c.* put in to the last.

The cause was tried before Mr. Baron Maule at the last Spring Assizes for Somersetshire. At the trial, the bankruptcy of Creed was admitted, and it was proved that the goods were sold by the defendant as agent of Creed, in contemplation of Creed's bankruptcy, for the purpose of raising money for the benefit of the defendant and Creed. And the learned judge told the jury, that, if any sale was made by the defendant and Creed with the view to defeat or delay the creditors of Creed, and such sale was fraudulent on the part of the buyer, it was an act of bankruptcy, and that the defendant was liable for that sale, and for all subsequent matters in which he assisted; but that such sale was not an act of bankruptcy, unless the buyer knew

(42) In that case there was a culpable abstinence from inquiry on the part of the purchasers, the circumstances being such as ought to have excited their suspicion, and consequently a legal fraud.

the sale to be fraudulent: and that any intention to delay creditors, whether by way of fraudulent preference or otherwise, would be sufficient.

The jury negatived the buyers' knowledge of any fraud, and the verdict was entered for the defendant.

A motion for a new trial was afterwards made, on two grounds—first, that the finding of the jury was contrary to the evidence—secondly, that the direction of the learned judge was incorrect, in stating that the buyers' knowledge of the fraud was necessary to constitute an act of bankruptcy. But, as upon reference to the learned judge, he expressed himself to be satisfied with the verdict, the rule was granted on the last ground only.

The only question, therefore, which arises upon this state of facts, is, whether, assuming the sale of the bankrupt's goods to have been made by him with the fraudulent purpose of delaying his creditors for his own benefit or that of the defendant, such sale amounted to an act of bankruptcy, where the purchaser acted *bonâ fide* and in ignorance of such purpose and intention of the bankrupt. And we are of opinion that the direction of the learned judge on this point was correct.

The words descriptive of an act of bankruptcy in the 6 Geo. 4, c. 16, s. 3, are, "shall make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, with intent to defeat or delay his creditors." In this case there appears to have been a fraudulent *intent* on the part of the seller to defeat his creditors, for the benefit of the defendant; but there was no *gift*, *delivery*, or *transfer* of the goods to the defendant; he being only the agent of the seller, by whom the sale to the buyers was effected; for, it appears upon the evidence that the defendant was merely employed to procure purchasers for the goods, the goods remaining in the possession of the bankrupt himself, or under his control, until they were delivered by his order to the purchasers; and, as to the

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buyers, there was not any transfer or delivery to them which was fraudulent on their part.

Now, the precise question whether fraud on the part of the buyer was a necessary ingredient in the act of bankruptcy contemplated by the statute, came under the consideration of the court of King's Bench in the case of *Baxter v. Pritchard*, 1 Ad. & E. 456; which court, after full discussion, and time taken to consider, decided that *the sale* of the whole of a tradesman's stock to a bonâ fide purchaser who pays a fair price for it, in ignorance of any fraudulent intention of the seller, was no act of bankruptcy. The judgment was pronounced in that case by Lord Denman, who had entertained a different opinion at the trial. In delivering that judgment, his lordship referred to the case of *Rose v. Haycock*, in which Mr. Baron Hullock had held that the mere fact of selling the whole of a trader's property was not of itself an act of bankruptcy, without proof of fraud; and to *Cook v. Caldecott*, M. & M. 522, where Lord Tenterden had held that a sale cannot in reason be held to be a *fraudulent transfer*, unless it takes place under such circumstances that the buyer, as a man of business and understanding, ought to suspect and believe that the seller means to get money for himself in fraud of his creditors, and that the sale is made for that purpose: he also referred to other cases mentioned in the report above referred to.

Upon the ground, therefore, that there was no delivery at all of any goods to the defendant, and that, so far as the question turns upon a fraudulent sale, there was no sale which was fraudulent on the part of the buyers, we think there was no act of bankruptcy proved, and that the rule for a new trial must be discharged.

Rule discharged.

LEWIS v. KIRBY.

THIS was a rule calling upon an attorney to shew cause why he should not deliver up certain deeds alleged to have been deposited with him. The affidavits upon which cause was shewn in the last term stating that the deeds had been stolen by the applicant, and had been claimed by and delivered up to the right owner, time was asked to answer them. The court directed the case to be put in the peremptory paper for the sixth day of this term—the affidavits in answer to be filed a week before the term.

Knowles—upon a statement that the applicant, who resided at a considerable distance from London, had been prevented by poverty from coming to town for the purpose of availing herself of the indulgence of the court in due time—prayed that further time might be granted for filing the affidavits.

TINDAL, C. J.—The excuse offered is not sufficient. The party's presence in London was not required: the affidavits might have been sworn before a commissioner in the country. We cannot permit the rule to bend to so flimsy a pretext. Some vis major, some substantial difficulty should be shewn.

The rest of the court concurring—

Knowles took nothing.

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 Tindal, J.
 Nov. 7th.
 The court refused to enlarge the time for filing affidavits in answer to those filed in opposition to a rule to shew cause, poverty and residence of the party at a distance from London being the only excuse for not having filed them in time.

1839.

Tuesday,
Nov. 12th.

The court refused to set aside an award, or to stay the proceedings, on the ground that the arbitrator had been imposed upon by false evidence.

PILMORE v. HOOD.

THIS was an action on the case for a false representation, on the sale of a public-house, called "The Red Cow," in Long Lane, Smithfield, as to the quantity of business done; see the declaration, ante, Vol. 6, p. 827. This court held, on demurrer, that the defendant was liable for a false representation as to the value of the business, made by him to one Bowmer, to whom he had contracted to sell the premises, and by Bowmer communicated to the plaintiff, whom Bowmer had substituted as the purchaser in his stead. The cause was referred. When the parties were before the arbitrator, in February last, the defendant called his wine and spirit merchant for the purpose of proving the quantities of wines and spirits *purchased* from him by the defendant within a certain period from the time of making the contract for the sale of the house—the amount of the trade being estimated by the *purchases*, and not by the *sales*. This witness proved that he had sold wines and spirits to the defendant to a large amount, giving the sums and dates; and upon his evidence, the arbitrator determined in favour of the defendant.

Upon an affidavit by the wine merchant, that, although the quantities of wines and spirits deposed to by him had in fact been *sold* to the defendant, yet a great portion of them had not been *delivered*, but remained in the docks until long after the sale of the house, and were then sold to other persons; and also an affidavit by the plaintiff (the purchaser of the house), that, upon receiving information of the fraud that had been practised upon him, he went to the docks, and there saw a large quantity of wines and spirits which the arbitrator had been induced to believe had been sold to the defendant, and delivered at the house in question before the contract of sale, and that the fraud had only been disclosed to the plaintiff on the 6th instant—

Erle moved to set aside the award, on the ground that the arbitrator had been induced by the false evidence given before him to determine as he did. But, as two terms had elapsed since the making of the award, the court thought they could not interfere.

He then submitted that the court, at all events, had power to stay the proceedings, a gross fraud having been practised by one of its suitors.

TINDAL, C. J.—I fear it would be a dangerous innovation upon the practice of the court to permit a new trial to be moved for in Michaelmas Term, the cause having been tried in Hilary Vacation, upon a suggestion of fraud. Besides, the only deponent whose evidence amounts to anything, is, the wine merchant, who was himself a party to the fraud. His part in the transaction was so discreditable that we cannot put much faith in his present statement. It seems that he is desirous of being on good terms with “The Red Cow,” whoever might be its proprietor. The case certainly is one of extreme hardship. But, however anxious we may be to prevent the defendant from further profiting by his fraud, no authority having been cited to shew that the court has under similar circumstances ever interfered after such a lapse of time, I think it would be disadvantageous to the general administration of justice to relax the rule.

COLTMAN, J.—After the evidence given by him before the arbitrator, I really think we should be doing wrong to attach the least credit to this wine merchant’s affidavit.

The rest of the Court concurring—

Rule refused (43).

(43) The case of *Tipton v. Gardner*, 5 N. & M. 424, 4 Ad. & E. 317, is somewhat analogous. There, on a motion for costs under the 43

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Wednesday
Nov. 13th.

An alien amy, though he has never been in this country, may maintain an action for a libel published in this country.

PISANI v. LAWSON.

THIS was an action of libel brought by the plaintiff, the chief of the dragomans or interpreters attached to the British Embassy at the Ottoman Porte, for an alleged libel published by the defendant in *The Times* newspaper.

The first count of the declaration stated that theretofore and before the time of the committing the grievances by the defendant thereafter mentioned, to wit, on the 1st January, 1837, and from thence continually until and at the time of the committing the said several grievances by the defendant as thereafter mentioned, our late sovereign lord King William the Fourth was, and our now sovereign lady the Queen still is, on terms of peace and amity with the Ottoman Porte: that, during all the time last aforesaid, the Right Hon. John Brabazon, Lord Ponsonby, was and still is ambassador from our said late lord the king to the said Ottoman Porte, the said Ottoman Porte being during all the time aforesaid a foreign power on terms of peace and amity with his said late majesty, and the said Lord Ponsonby during all the time aforesaid was and still is the

Geo. 3, c. 46, s. 3, (the plaintiff having arrested for 35*l.* and recovered only 19*l.*), affidavits were put in for the plaintiff, sworn by himself and others, contradicting the evidence given at the trial for the defendant, and impeaching the credit and competency of his principal witness (who had stated herself to be his *servant*, when in fact she was his *partner*): no motion had been made by the plaintiff for a new trial or to increase the damages: it was held that the verdict was *primâ facie* evidence of the want of cause for arresting;

and that the court could not try, upon affidavit, whether or not such verdict was well founded. "It might," says Lord Denman, "have been made the ground of a *motion for a new trial*, that the evidence of Mrs. Inch was fraudulently palmed upon the jury as the evidence of an independent witness; but there seems to me to be nothing to take the case out of the general rule that the amount of the verdict is *primâ facie* proof of the want of reasonable and probable cause to arrest for the amount sworn to."

chief of the British embassy at Constantinople : that there were during all the time aforesaid, and still are, certain persons called dragomans or interpreters, of which said dragomans or interpreters a certain limited number, to wit, five, were during all the time aforesaid and still are employed by the British government in the service of the said Lord Ponsonby, being such ambassador as aforesaid, as dragomans or interpreters to and of him the said Lord Ponsonby as such ambassador as aforesaid, and to and of the British embassy at Constantinople, of which he the said Lord Ponsonby was and is such chief as aforesaid, for certain reward to them the said last mentioned dragomans or interpreters respectively in that behalf : that the said plaintiff during all the time aforesaid was and still is one of the said last mentioned five dragomans or interpreters so employed as aforesaid by the said British government in the service of the said Lord Ponsonby, being such ambassador as aforesaid, as such dragomans or interpreters to and of him the said Lord Ponsonby as such ambassador as aforesaid, and to and of the said British embassy at Constantinople, of which he the said Lord Ponsonby was and is such chief as aforesaid : that the employment of the said plaintiff as one of the said five dragomans or interpreters so employed by the said British government in the service of the said Lord Ponsonby as aforesaid, is, and during all the time aforesaid was, an office of considerable trust and responsibility, and could not nor can be properly executed without skill and fidelity on the part of the person holding it, and is also and during all the time aforesaid was a situation of considerable value, profit, and emolument : that the plaintiff during all the time aforesaid had behaved with skill and fidelity in the execution of his said employment as one of the said five dragomans or interpreters so employed by the said British government in the service of the said Lord Ponsonby as aforesaid, and had never shewn any incapacity or been guilty of any dishonesty

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in his conduct or behaviour therein; and the said plaintiff was always, until the committing of the grievances by the defendant as thereafter mentioned, esteemed, accepted, and reputed by and amongst all persons to whom he was in any wise known to be a person of good name, fame, and reputation; and the said plaintiff had not ever been guilty, nor, until the time of the committing the grievances by the defendant as thereafter mentioned, been suspected to have been guilty of any of the misconduct thereafter mentioned to have been imputed to him the said plaintiff, or of any other such misconduct; by means of which said premises the said plaintiff had not only obtained the good opinion of all persons to whom he was known, but had also obtained and enjoyed great profit and emolument arising from his said last mentioned employment: yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that he the said plaintiff had shewn incapacity and had been and was guilty of dishonest conduct in his said employment, and thereby to injure the said plaintiff in his said employment, and to vex, harass, oppress, impoverish, and wholly ruin him, theretofore, to wit, on the 24th February, 1837, did print and publish, and cause and procure to be printed and published, of and concerning the said plaintiff, as one of the said five dragomans or interpreters so employed by the said British government in the service of the said Lord Ponsonby as aforesaid, and of and concerning the said five dragomans or interpreters so employed by the said British government in the service of the said Lord Ponsonby as aforesaid, of whom the said plaintiff was and is one as aforesaid, and of and concerning the behaviour and conduct of the said plaintiff and the said other dragomans or

interpreters so employed by the said British government, in the service of the said Lord Ponsonby as aforesaid, in his and their said employment, a certain false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory, and libellous matter following of and concerning the said plaintiff as one of the said dragomans or interpreters so employed in the service of the said Lord Ponsonby as aforesaid, and of and concerning the said other dragomans or interpreters so employed in the service of the said Lord Ponsonby as aforesaid, and of and concerning the behaviour and conduct of the said plaintiff and the said other dragomans or interpreters so employed in the service of the said Lord Ponsonby as aforesaid, in his and their said employment; that is to say, "The office of English interpreters at the Porte (meaning Libel. thereby the aforesaid Ottoman Porte) having hitherto been filled by individuals bred and born at Pera, it is necessary to inquire into the character which public opinion gives to the class from which they have been drawn, to form some idea as to the competency of the persons whom government has entrusted with so much responsibility. 'The Perotes,' observes a French writer who for some years resided among them, 'belong to so degraded a race, that I must take care how I speak of them; the truth looks so much like slander, that it might easily be mistaken for it.' Commodore Porter, the American Chargé d'Affaires at Constantinople, who had numerous opportunities of putting the capacity and probity of the Perotes to the test, says they belong to a distinct race, noted for its immorality, despised for its ignorance, and only tolerated from their supposed necessity. The business of the old men is to speak a little Turkish, to make their employers believe they speak it well, to pry into the secrets of their employers, and betray them when they can sell them to most advantage. To be up to all sorts of tricks and villainy of intrigue and rascallity. The same opinions with regard to the Perotes have been expressed by every

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traveller, professed by every European living in Turkey, so that I conceive it perfectly supererogatory to waste more words on a subject on which every one agrees. What, then, say of the folly of the British government in continuing to employ in its relations with the Porte (meaning thereby the aforesaid Ottoman Porte) an unprincipled set of men who have no interest but their own to support? Although I have in my possession numerous and well authenticated facts to prove the incapacity and flagrant dishonesty of the interpreters in whom Lord Ponsonby has thought proper to place unbounded confidence (meaning thereby the said interpreters so employed by the said British government in the service of the said Lord Ponsonby, and of whom the plaintiff is one as aforesaid), I prefer keeping the rod in pickle, to use it should these gentlemen (meaning thereby the said last-mentioned interpreters) require it. I should perhaps not even have mentioned the subject; I felt that I could not render a greater service to my country than by calling government's attention to the consideration of the real causes of the injuries England's interests and consideration in the East have suffered. Unless this foul cancer is extirpated, the wound will never heal; every chance is removed of an improvement in the position of affairs occurring in Turkey. The only individual in the service of government who has perceived how ruinous to England's interest has proved the absurd system of intercourse between the Porte and Great Britain, is Mr. D'Urquhart. Should he be permitted to remain at Constantinople, a novelist may soon have an opportunity to write, 'The last of Dragomans.'" By means of the committing of which said grievances by the defendant as aforesaid, he, the plaintiff, had been and was greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, insomuch that divers persons had, by reason of the committing the grievances by the defendant as aforesaid, suspected and believed, and still suspect and believe

the plaintiff to have shewn incapacity, and to have been guilty of dishonesty in his said employment, and had by reason of the committing the grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still refuse, to have any transaction, acquaintance, or discourse with the plaintiff, as they would otherwise have had: and the plaintiff had, by reason of the committing the grievances by the defendant as aforesaid, been greatly injured in his said employment, and had been and was otherwise greatly injured.

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The second count, in addition to the prefatory matters set forth in the first count, contained an allegation, that, "during all the time aforesaid there was and still is a certain minister of state of the said Ottoman Porte called the Reis Effendi; and there was also during all the time aforesaid, and still is, a certain council of state of the said Ottoman Porte called the Divan, and certain state documents occasionally issued by the government of the said Ottoman Porte, called firman." The libel upon which that count was framed, so far as it affected the plaintiff, consisted of a statement of an alleged imposition practised by the plaintiff, in his character of chief of the dragomans, upon the British Ambassador at Constantinople, in the conduct of a negotiation with the Reis Effendi for procuring from the Divan a firman for the free navigation of the Euphrates, to enable the British government to open a line of communication with India, across that portion of the Sultan's territory situate between the Mediterranean and the Persian Gulf—concluding as before.

Second count.

The defendant pleaded—Thirdly, that the plaintiff, before and at the time of the committing of the said supposed grievances in the declaration mentioned, was, and still is, an alien born, that is to say, at Constantinople, in the dominions of the Ottoman Porte, and then was, and still is, resident and living out of this kingdom, and within the dominions of the Ottoman Porte, at parts beyond the seas,

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to wit, at Constantinople aforesaid; that the plaintiff had never been domiciled or naturalized, or made a denizen, within the dominions of our sovereign lady the queen, or been in obedience or subject to, or in the allegiance of, any of the sovereigns of these realms, or subject to the laws or customs of the united kingdom of Great Britain and Ireland, or of any of the countries or territories comprised within the last-mentioned dominions; that the plaintiff had never used or exercised, and does not now use or exercise trade as a merchant in, to, or from any part of the said united kingdom, or of the said countries and territories; and that the plaintiff is not now in the allegiance of our lady the queen, or in any manner subject to her laws—verification.

Demurrer.

To this plea the plaintiff demurred specially; assigning for causes—that the alienage of the plaintiff stated in the said plea did not, nor did any of the matters stated in the said plea, shew any incapacity or disability in the plaintiff to maintain this action; that the said plea was a dilatory plea, and contained matter only pleadable in *abatement*, and was nevertheless pleaded in *bar* of the action; that the plea did not shew or aver that the plaintiff was not in England when he commenced this action; and that the plea was double and bad for duplicity, and was in other respects uncertain, informal, and insufficient.

Joinder.

The defendant joined in demurrer.

1. Whether the
action main-
tainable.

J. W. Smith in support of the demurrer.—1. The first question is, whether an alien, the subject of a state in amity with this country, can maintain an action for a libel published of him here. In Brooke's Abridgment, *Nonabilitie*, pl. 62, "Trīs, fuit dit in banč regis, q̄ adire q̄ le pl'est alien née, iugement si sera respond', nest ple in actiō personal, contrař in action real, tamen ceo ad estre in question puis cel temps in m̄ le court, et fuit dit que alien née nest ple sil ne dit oustř q̄ le pl'est de allegeance dun tiel enemy le

roy in trīs, car nest ple in actiō personal vers alien q̄ est de allegiance de tiel prince q̄ est de amity le roy :” Trinity, 1 Edw. 6. And in the same book, title *Denizen & Alien*, pl. 10—“ Nota, p̄ totā curiā, in bāco regis, q̄ aliō née poet port actiō psonell, & šra respōd’ sās estre dishable p̄ ceo q̄ il est alien næ. Et ecōtř in actiō real; & idem videt’ in actiō mixt; & il poet auer ppertie, & achate, & vend.” [Tindal, C. J.—It does not appear there whether the tort was committed within the kingdom or not.] In the passage first cited, the action appears to have been trespass. [Tindal, C. J.—It might have been trespass for breaking and entering a house in the occupation of the plaintiff as a foreign merchant; and that is shut out by the form of the plea.] In Comyns’s Digest, *Alien*, (C. 5), it is said: “ A turk, infidel, &c., is not a perpetual enemy, but may have the privilege of a friend. An Alien friend may have all personal actions for his goods or property. So, an action for slander”—citing *Tirlot v. Morris*, 1 Bulstr. 134. That was an action upon the case for scandalous words spoken by the defendant of the plaintiff, being laid to be a merchant: the words were these—Tirlot (the plaintiff) is a bankrupt: upon not guilty pleaded, a verdict was given for the plaintiff. It was moved in arrest of judgment, that the plaintiff ought not to have this action, for that he was an alien born, and a merchant stranger, and out of the allegiance of the king—whether the plaintiff should have an action upon the case for these words thus spoken of him, was the only question. Flemming, C. J., and three Justices held, contrary

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(44) The opinion of Williams, J., was as follows:—“ That this action here lyeth not by the plaintiff, because that he was alienigena, sub ligeantia, of another, et extra ligeantiam domini regis: such a merchant alien may well have a personal action here, if the same be

for his merchandize, or for his house, for that inasmuch as the law doth suffer him to merchandise and to have a house here, the law doth also enable him and gives him power to maintain a personal action for the same by 20 E. 4 fo. 6, pla. 6.: but clearly he cannot

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to the opinion of Williams, J. (44), "that such a merchant alien may well have and maintain such an action upon the case for words spoken tending to his defamation (as the words here spoken of him in this case are), or he may well have an action for an assault and battery upon himself." [Coltman, J.—Was the plaintiff there resident in this country?] The report does not expressly so state: but, unless he were, he would not be subject to the bankrupt laws: that, however, can make no difference; for, the only consequence of his non-residence, is, that the plaintiff must (as in fact he has done in this case—see 5 Scott, 418) give security for costs. It may therefore be assumed that an alien amy is not under any general disability (45).

2. As to the
form of the plea.

2. The next question arises upon the form of the plea. This plea is so pleaded that the court cannot give effect to it: the matter contained in it is pleadable only in abatement, whereas here it is pleaded as a bar to the action; it is therefore bad on general demurrer. In Bacon's Abridgment, *Aliens*, (E), it is said, that, "if alienage be pleaded to an alien in league, it must be pleaded in abatement or disability of the plaintiff; but, if it be to an alien enemy, it may be pleaded either in abatement or in bar to the action, because it is forfeited to the king as a reprisal for the damages committed by the dominion in enmity with him." [Bosanquet, J.—That is, it will be in bar if the alien is an enemy at the time; otherwise, in abatement.] The plea of alienage is found in Comyns's Digest, title *Abatement*, (E. 4.). Alienage, like outlawry, is a *personal* disability; and it is not the less pleadable in abatement because the defendant cannot give the plaintiff a better

by the law maintain any personall action for defamation of him by any words spoken of him. This is the first case that ever I heard in this kind, and it is *primæ impressionis*; and in this case here I hold with Littleton, in his chapter of Villen-

age, fo. 43, pl. 198, that it shall be a good bar to the action for to say that the plaintiff was an alien."

(45) See Sparenburgh v. Banatyne, 1 Bos. & Pul. 163; and Viner's Abridgment, *Alien*, (H).

roy in trñs, car nest ple in actiō personal vers alien q̄ est de allegiance de tiel prince q̄ est de amity le roy :” Trinity, 1 Edw. 6 (44). And in the same book, title *Denizen & Alien*, pl. 10—“Nota, p totā curiā, in bāco regis, q̄ aliē née poet port actiō psonell, & šra respōd’ sās estre dishable p ceo q̄ il est alien næ. Et ecōtř in actiō real; & idem videt’ in actiō mixt; & il poet auer ppertie, & achate, & vend.” [Tindal, C. J.—It does not appear there whether the tort was committed within the kingdom or not.] In the passage first cited, the action appears to have been trespass. [Tindal, C. J.—It might have been trespass for breaking and entering a house in the occupation of the plaintiff as a foreign merchant; and that is shut out by the form of this plea.] In Comyns’s Digest, *Alien*, (C. 5), it is said: “A turk, infidel, &c., is not a perpetual enemy, but may have the privilege of a friend. An alien friend may have all personal actions for his goods or property. So, an action for slander”—citing *Tirlot v. Morris*, 1 Bulst. 134, Yelv. 198. That was an action upon the case for scandalous words spoken by the defendant of the plaintiff, being laid to be a merchant: the words were these—Tirlot (the plaintiff) is a bankrupt: upon not guilty pleaded, a verdict was given for the plaintiff. It was moved in arrest of judgment, that the plaintiff ought not to have this action, for that he was an alien born, and a merchant stranger, and out of the allegiance of the king—whether the plaintiff should have an action upon the case for these words thus spoken of him, was the only ques-

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(44) “In trespass, it was said in B. R., that to say that the plaintiff is alien born, judgment if he shall be answered, is no plea in action personal; contra in action real. But this has been in question since that time in the same court, and it was said that alien born is no plea, if he does not say further that the

plaintiff is of allegiance of such an one, enemy of the king; for, it is no plea in action personal against an alien, that he is of allegiance of such a prince, who is in amity with the king.” Viner’s Abridgment, *Alien*, (H), pl. 6—citing Brooke, ubi supra.

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tion. Flemming, C. J., and three Justices held, contrary to the opinion of Williams, J. (45), "that such a merchant alien may well have and maintain such an action upon the case for words spoken tending to his defamation (as the words here spoken of him in this case are), or he may well have an action for an assault and battery upon himself." [Coltman, J.—Was the plaintiff in that case resident in this country?] The report does not expressly so state: but, unless he were, he would not be subject to the bankrupt laws: that, however, can make no difference; for, the only consequence of his non-residence, is, that the plaintiff must (as in fact he has done in this case) (46) give security for costs. It may therefore be assumed that an alien may is not under any general disability (47).

2. As to the
 form of the plea.

2. The next question arises upon the form of the plea. This plea is so pleaded that the court cannot give effect to it: the matter contained in it is pleadable only in abatement, whereas here it is pleaded as a bar to the action; it is therefore bad on general demurrer. In Bacon's Abridgment, *Aliens*, (E), it is said, that, "if alienage be pleaded to an alien in league, it must be pleaded in abatement or

(45) The opinion of Williams, J., was as follows:—"That this action here lyeth not by the plaintiff, because that he was alienigena, sub ligeantia, of another, et extra ligeantiam domini regis: such a merchant alien may well have a personal action here, if the same be for his merchandize, or for his house, for that inasmuch as the law doth suffer him to merchandise and to have a house here, the law doth also enable him and gives him power to maintain a personal action for the same by 20 E. 4 fo. 6, pla. 6.: but clearly he cannot by the law maintain any personal action for defamation of him by any

words spoken of him. This is the first case that ever I heard in this kind, and it is primæ impressionis; and in this case here I hold with Littleton, in his chapter of Villenage, fo. 43, pl. 198, that it shall be a good bar to the action for to say that the plaintiff was an alien."

(46) See 5 Scott, 418. And see *The Emperor of Brazil v. Robinson*, 1 N. & P. 817, 6 Ad. & E. 801, 5 Dowl. 522; and *Otho, King of Greece, v. Wright*, 6 Dowl. 12.

(47) See *Sparenburgh v. Banatyne*, 1 Bos. & Pul. 163; and *Viner's Abridgment, Alien*, (H).

disability of the plaintiff; but, if it be to an alien enemy, it may be pleaded either in abatement or in bar to the action, because it is forfeited to the king as a reprisal for the damages committed by the dominion in enmity with him." [*Bosanquet, J.*—That is, it will be in bar if the alien is an enemy at the time; otherwise, in abatement (48).] The plea of alienage is found in Comyns's Digest, title *Abatement*, (E. 4.). Alienage, like outlawry, is a *personal* disability; and it is not the less pleadable in abatement because the defendant cannot give the plaintiff a better writ. Littleton says, ss. 196, 198, "There are six manner of men, who, if they sue, judgment may be demanded if they shall be answered &c." "The third is, an alien, which is born out of the ligeance of our sovereign lord the king; if such alien will sue an action real or personal, the tenant or defendant may say that he was born in such a country, which is out of the king's allegiance, and ask judgment if he shall be answered." Upon which Lord Coke observes—Co. Litt. 129. b.—"The tenant or defendant shall neither plead alien née to the writ or to the action, but in disability of the person, as in case of villenage and outlawry. And Littleton is to be intended of an alien in league; for, if he be an alien enemy, the defendant may conclude to the action." So, in Gilbert's History of the Common Pleas, 3rd edit., p. 205, it is said: "The third disability is alienage, where one is born out of the king's liegeance; for, none shall maintain any action either real or personal whilst he is subject to an enemy to the king: but this impediment may be removed by being naturalized by act of parliament, enfranchised, or by letters patent. But an alien in league shall maintain personal actions, or else he would be incapacitated to merchandize; but no real or mixed action, because there is no necessity that he should settle. If it

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(48) Such seems to have been the opinion of Lord Mansfield and the rest of the judges of the court of King's Bench in the case of *Record v. Bettenham*, Burr. 1734.

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be pleaded in an alien in league, that must be in disability of the plaintiff; but, if it be an alien enemy, it must be pleaded to the action, because it is forfeited to the king, as a reprisal for the damages committed by the dominion in enmity with him."

Even assuming the plea not to be obnoxious to the foregoing objection, at least it ought to have excluded every presumable right in the plaintiff to maintain the action. This was distinctly held in *Casseres v. Bell*, 8 T. R. 166, where Lord Kenyon says: "After consulting the authorities on this subject, I am of opinion that these pleas cannot be supported. There is a precedent of a plea of this kind in *Derrier v. Arnaud*, reported in 4 Mod. 405, the original record of which we have examined. And according to that it seems, that, as this is an odious plea, the defendant must state every thing that can oust the plaintiff of his right of suing. It is there stated that the plaintiff was born in France, of foreign parents, and that he came into this kingdom without letters of safe conduct &c.; negating every presumption that could arise in favour of the plaintiff's right to sue. When I first read this case, it occurred to me, that, on principle, it was not necessary to negative all these facts in the defendant's plea: but the case in 4 Mod., and that cited from Sir J. Strange [*Openheimer v. Levi*, 2 Str. 1082], have removed my doubts; they shew that the plaintiff is not driven to reply any of these facts, for that the defendant must negative them in his plea." And Lawrence, J., adds: "There is another case, in 1 Ld. Raym. 282, *Wells v. Williams*, which shews that it is necessary for a defendant who pleads that the plaintiff is an alien enemy, to set forth all those facts in his plea that negative the plaintiff's right of suing here." The present plea does not negative the plaintiff's having been in this country at the time the libel was published or the action brought, which would place him under such a temporary allegiance to the sovereign of this realm as to en-

title him to maintain an action. So odious is this description of plea, that the court of King's Bench, in *Shombeck v. De La Cour*, 10 East, 326, refused to permit it to be pleaded together with a plea of tender: they also, in *Thrukenbrodt v. Payne*, 12 East, 206, refused to allow it to be pleaded in an action of trespass and false imprisonment, together with a special justification inconsistent therewith, and the general issue: and this court also, in *Feron v. Ladd*, 2 W. Blac. 1326, and *Thyatt v. Young*, 2 B. & P. 72, refused to allow it to be pleaded with the general issue.

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Platt, in support of the plea.—The policy of the common law closed our courts against foreigners whether friend or foe. By Magna Charta, c. 30, it was provided, quod "Omnes mercatores, nisi publicè antea prohibiti fuerint, habeant saluum & securum conductum exire de Anglia, et venire in Angliam, et morari, et ire per Angliam, tam per terram quam per aquam, ad emendum vel vendendum, sine omnibus malis tolnetis, per antiquas et rectas consuetudines, præterquam in tempore guerræ. Et si sint de terra contra nos guerrina, et tales inveniuntur in terra nostra in principio guerræ, attachientur sine dampno corporum suorum vel rerum, donec sciatur à nobis vel à capitali justitiario nostro quomodo mercatores terræ nostræ tractentur, qui tunc inveniuntur in terra illa contra nos guerrina. Et si nostri salvi sint ibi, alii salvi sint in terra nostra." The rights of foreign merchants to sue for debts contracted here, are recognized by the statute of Acton Burnell, 11 Edw. 1, and the statute of Merchants, 13 Edw. 1. "Ligeance," says Lord Coke, in *Calvin's Case*, 7 Rep. 1, "is a true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an incident inseparable to every subject: for, as soon as he is born, he oweth by birthright ligeance and obedience to his sovereign. Ligeantia est vinculum fidei; and ligeantia est quasi legis essentia. Ligeantia est ligamentum, quasi ligatio mentium: quia sicut ligamentum est.

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connexio articularum et juncturarum, &c. As the ligatures or strings do knit together the joints of all the parts of the body, so doth ligeance join together the sovereign and all his subjects, quasi uno ligamine. Glanville, who wrote in the reign of Hen. 2 (lib. 9, cap. 4), speaking of the connexion which ought to be between the lord and tenant that holdeth by homage, saith, that *mutua debet esse domini et fidelitatis connexio, ita quod quantum debet domino ex homagio, tantum illi debet dominus ex dominio, præter solam reverentiam*, and the lord (saith he) ought to defend his tenant. But between the sovereign and the subject there is without comparison a higher and greater connexion: for, as the subject oweth to the king his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects, *regere et protegere subditos*: so as between the sovereign and subject there is *duplex et reciprocum ligamen*; quia sicut subditus regni tenetur ad obedientiam, ita rex subdito tenetur ad protectionem: meritò igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen. And therefore it is holden in 20 Hen. 7, 8. a., that there is a liege or ligeance between the king and the subject. And Fortescue, cap. 13: *Rex ad tutelam legis corporum et bonorum subditorum erectus est*. And in the acts of parliament of 10 Ric. 2, cap. 5, and 11 Ric. 2, cap. 1, 14 Hen. 8, cap. 2, &c., subjects are called liege people; and in the acts of parliament in 34 Hen. 8, cap. 1, and 35 Hen. 8, cap. 3, &c., the king is called the liege lord of his subjects. And with this agreeth M. Skeene, in his book *De Expositione Verborum*, ligeance is the mutual bond and obligation between the king and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them." "There is found in the law four kinds of ligeances; the first is, *ligeantia naturalis, absoluta, pura, et indefinita*, and this originally is due by nature and birth-right, and is called *alta ligcantia*, and he that oweth this is

called *subditus natus*. The second is called *ligeantia acquisita*, not by nature, but by acquisition or denization, being called a denizen, or rather *donaizon*, because he is *subditus datus*. The third is *ligeantia localis*, wrought by the law; and that is when an alien that is in amity cometh into England, because, as long as he is within England, he is within the king's protection; therefore, so long as he is here, he oweth unto the king a local obedience or ligeance, for that the one (as it hath been said) draweth the other." The right of suing is the result of this last-mentioned ligeance. Again—17. a.: "Every man is either *alienigena*, an alien born, or *subditus*, a subject born. Every alien is either a friend that is in league, &c., or an enemy that is in open war, &c. Every alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *specialiter permissus*, permitted especially. Every subject is either *natus*, born, or *datus*, given or made; and of these briefly in their order. An alien friend, as at this time, a German, a Frenchman, a Spaniard, &c. (all the kings and princes in Christendom being now in league with our sovereign: but a Scot, being a subject, cannot be said to be a friend, nor Scotland to be *solum amici*), may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure, or goods personal whatsoever, as well as an Englishman, and may maintain any action *for the same*: but lands within this realm, or houses (but for their necessary habitation only) alien friends cannot acquire or get, nor maintain any action real or personal for any land or house, unless the house be for their necessary habitation. For, if they should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffic, which is the life of every island. But, if this alien become an enemy (as all alien friends may), then he is utterly disabled to maintain any action or get any thing within this realm. And this is to be understood of a temporary alien, that,

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being an enemy, may be a friend, or, becoming a friend, may be an enemy." This is a clear and distinct authority to shew that it is only in favour of trade and commerce that aliens are under any circumstances enabled to maintain actions in our courts of law. In *Wells v. Williams* 1 Salk. 46, 1 Lord Raym. 282, Lut. 34, it is said: "If an alien enemy comes hither sub salvo conductu, he may maintain an action; if an alien amy comes hither in time of peace, per licentiam domini regis, as the French protestants did, and lives here sub protectione, and a war afterwards begins between the two nations, he may maintain an action; for, *suing is but a consequential right of protection*: and therefore an alien enemy that is here in peace under protection, may sue a bond; *aliter of one commorant in his own country*." In Viner's Abridgment, *Alien*, (H.) pl. 4, it is said, that, "by the intercourse in all the world, merchants aliens may merchandize, and their bargains good, and therefore ex æquitate they ought to have actions for their debts and goods"—citing Br. *Denizen*, pl. 16: 19 Edw. 4. 6. All the authorities that are to be found in the books are bottomed upon the right to traffic. Such, even, was the foundation of the decision of *Tirlot v. Morris*: the dictum that a merchant alien "may have an action for an assault and battery upon himself," was extrajudicial, and wholly unwarranted by any previous case. *Rex v. Peltier*, Sel. Ni. Pri. 8th edit., 1056, n., was the case of a criminal information for a libel on a foreign potentate: and neither in that case nor in *Rex v. Lord George Gordon* and *Rex v. Vint*, Russell on Crimes, 223, was the liability of the party rested upon any personal right in the individual libelled; the doctrine there laid down was unnecessarily agitated if the mere personal injury was sufficient to sustain the indictment. [*Tindal*, C. J.—Suppose an assault by an Englishman against a native of France within the French territory, and the former immediately comes over to this country; would the

Frenchman have no remedy for the injury in our courts?] Would the case be different if *both* were foreigners? Suppose a subject of this country imprisons a *slave* in the United States of America, could the slave maintain an action in respect of such imprisonment here? Suppose an assault to be committed at Constantinople, by a turk upon another subject of the Porte, and the former should come to this country; would he be liable to an action here for that assault? He clearly could not be indicted. The publication of a libel is equally with an assault a matter of criminal jurisdiction: the injuries are similar, and the remedy for each is strictly personal. There may be no law of libel in Turkey: what right, then, has this plaintiff, who is an alien, owing no allegiance to our sovereign, to avail himself of the more liberal[?] institutions of this country? Qui sentit commodum, sentire debet et onus. What onus does this plaintiff bear? If he had been in a situation to hold local ligeance to the sovereign of this realm for a single hour, that might have been onus sufficient to entitle him to the commodum: but, in the absence of any such ligeance, he clearly cannot be heard in an English court of law for any purpose unconnected with trade.

J. W. Smith, in reply, was stopped by the court.

TINDAL, C. J.—Notwithstanding the arguments that have been urged on the part of the defendant, it appears to me that this action is maintainable. Undoubtedly an alien is by law disabled from bringing an action in respect of realty, because he is by law disqualified to hold land. This, however, is a personal action, for a wrong committed in this country: and so long ago as the 6th of Henry 8, it was held, that an alien living in France may bring a *personal action* in our courts in time of peace—Dyer, 2. b. The case in Dyer is as follows:—"An alien living in France brought a writ of *debt* in the Common Pleas, and

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the defendant, by Row, Serjeant, demanded judgment if he should be answered, for that *he was born out of the kingdom*, viz. out of the allegiance of our lord the king. And Shelley, Fitzj., and Brudnell, Justices (absente Englefelde), held this to be no plea: for, notwithstanding he is an alien, yet *he shall be received in all personal actions*, if there be no war between this realm and the kingdom to which the alien belongs &c., for then he is an enemy of our lord the king, in which case he shall have no benefit from his laws. But, in real actions, the plea aforesaid is good, for no alien can have land within the realm unless he be a denizen: quod nota. And Fitzj. said that he learnt this distinction first from Vavisor, Justice." That case seems to me to correspond with and to comprehend the present. The only other case cited that is directly applicable is that of *Tirlot v. Morris*. That was an action upon the case for scandalous words spoken by the defendant of the plaintiff, being laid to be a merchant: the words were—Tirlot (the plaintiff) is a bankrupt: upon not guilty pleaded, a verdict was given for the plaintiff. It was moved in arrest of judgment, that the plaintiff ought not to have this action, for that he was an alien born, and a merchant stranger, and out of the allegiance of the king—whether the plaintiff should have an action upon the case for these words thus spoken of him, was the only question. Flemming, C. J., and three Justices held, contrary to the opinion of Williams, J., "that such a merchant alien may well have and maintain such an action upon the case for words spoken tending to his defamation (as the words here spoken of him in this case are), or *he may well have an action for an assault and battery upon himself*" (49). I do not find any authority for the distinction

(49) Yelverton (*Tuerloote v. Morrison*, Yelv. 198,) gives a somewhat different version of this case:—"The plaintiff declared, that,

whereas 19 Maii, Anno 8 Jac., and for ten years past he fuit & adhuc est mercator in England and præcipue in London, and had made

suggested in that case by Williams, J., and now again sought to be raised, nor any authority to support such a plea. It would create in the minds of foreigners a very unfavourable impression of the justice of our laws, if we were to hold that an alien friend cannot maintain an action of this description in our courts, unless by some interval of residence here he has incurred the onus of what Lord Coke calls *ligeantia localis*. I am of opinion that the plaintiff is entitled to judgment.

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BOSANQUET, J.—I am of the same opinion. The facts stated in the declaration and admitted by the plea import a wrong done to the plaintiff. But it is said that the plaintiff, by reason of his being an alien who has never been in

true payment of all his debts to his creditors, yet the defendant 19 Maii Anno 8, having communication with one Roger Twiford of the plaintiff, spoke of the plaintiff these words, viz. He (innuendo the plaintiff) is a bankrupt, and he (innuendo the plaintiff) is fled beyond the seas for so much money, to his damage 500*l*. The defendant pleaded that the plaintiff at the time of the speaking of the words was an alien, and born in villa de Courtrick in Brabant in partibus transmarin' under the obedience of the Duke of Brabant, et extra ligeantiam domini regis; et hoc paratus est verificare &c.; upon which the plaintiff demurred. And it was adjudged for the plaintiff; for, traffic between merchants strangers and domestic merchants is warranted, both by the law of nations and by the law of the land: and the common law in all things which merely concern his trade of merchandize protects him, and this protection extends both to his goods

and to his person; for, the law allows him safe conduct with his goods, because it is beneficial to the king in his Customs; and enables him likewise to have within this realm an habitation by lease from any stranger, and also to have a personal action, as, to demand debt for his merchandizes, with damages for them, if they are wrongfully taken. And this slander here, although it concerns the plaintiff only in his person, yet, because it impairs his credit in his trade by which he is to live, and by which other subjects of the king have benefit by their commerce with him; therefore it is actionable. Adjudged per totam Curiam."

From the whole tenor of this report, it seems clear that the plaintiff was resident in England at the time the cause of action accrued, and that his right to sue was based upon his mercantile character; and if so it manifestly is no authority for the decision in the present case.

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this country, and consequently never at any time owed allegiance to its sovereign, is under a personal disability to maintain this description of action. The proposition that an alien under such circumstances is not within the protection of our laws, is not, universally, true. A foreign merchant confessedly may maintain an action in our courts for the recovery of a debt or the enforcement of a contract due from or made with a native. But this, it is contended on the part of the defendant, is a mere relaxation of the rigour of our law in favour of commerce. That, however, may very well be doubted. In the case cited from Dyer, 2. a., an alien amy was held entitled to sue for a debt in our courts; and in *Tirlot v. Morris* he was held entitled to maintain an action of slander: and in neither case was this right put upon the ground of the plaintiff being a merchant or one owing local ligeance to the sovereign of this realm. It seems to be admitted, on the part of the defendant, that the plaintiff might maintain this action if he had ever, even for a single hour, been in this country; for, in that case, he would owe a temporary allegiance to the sovereign that would entitle him to the protection of the law. That being so, it would be very extraordinary if this action were not under the circumstances maintainable. The declaration states that before and at the time of the committing of the grievance complained of, Lord Ponsonby was ambassador from our sovereign to the Ottoman Porte, a foreign power on terms of amity with this country; and that the plaintiff was a dragoman or interpreter in the employ of Lord Ponsonby as such ambassador—in other words that the plaintiff was in the service of this country; and that the libel complained of was published of and concerning him in relation to such employment or service. If a person so situated is not entitled to the protection of our law, it is impossible to suggest a case where a foreigner, not being a merchant, could be entitled to such protection.

COLTMAN, J.—I am of the same opinion. I think it would reflect great discredit upon our law if this plaintiff were held to be disentitled to maintain an action for the injury he complains of. The case differs materially from that suggested by the counsel for the plaintiff, of a libel published by a foreigner of a foreigner in a foreign country. The burthen of shewing himself exempt from liability is cast upon the defendant. No authority whatever has been adduced in support of the doctrine that is contended for on his behalf: and it is equally void of reason. The ground upon which the defence is rested, is, that the plaintiff is not and never has been within the allegiance of the sovereign of this country. The argument would equally hold in the case of a merchant: there is nothing in any statute giving to merchants any particular right of suit. And this is not a time for presenting obstacles to the free intercourse of friendly nations.

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MAULE, J.—I am also of opinion that the plea in question is bad. The only ground that has been suggested for holding the action not to be maintainable, is, that the plaintiff is *extra ligeantiam*. But every day's experience shews us that actions are maintained here by foreigners—for example, trover for running down vessels on the high seas—without objection. This declaration might have contained a count in trover: and it would be singular to hold the action to be maintainable as to that count, and that count only.

Judgment for the plaintiff.

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A representation made by the defendant as to the credit and circumstances of a firm of which he is a member, is a representation as to the credit of "another person," within the meaning of the stat. 9 Geo. 4, c. 14, s. 6.

DEVAUX and Another v. STEINKELLER.

THIS was an action on the case against the defendant for a false representation made by him as to the credit and circumstances of a firm of which he was himself a member.

The first count of the declaration stated that the plaintiffs, before and at the time of the committing of the grievance by the defendant as hereinafter next mentioned, carried on the trade and business of merchants, to wit, at London, and the defendant and one Charles Marie Alexandre Darlincourt and one Frederic Guillaume Ladame, to wit, at Paris, in the kingdom of France, also then carried on the trade and business of merchants, to wit, under the firm, style, and description of Darlincourt & Ladame, and the plaintiffs and the said firm of Darlincourt & Ladame had also previously been from time to time used and accustomed to have certain dealings with each other in the way of their said trade as such merchants as aforesaid, and the plaintiffs had also been previously accustomed from time to time to give credit to the said firm in account; that the plaintiffs, at the time of the committing of the grievances hereinafter next mentioned, had become and were suspicious of the credit and circumstances of the said firm, and had also then become and were unwilling to have further dealings with them as aforesaid, or to trust the said firm and give them further credit as aforesaid, and would not so have done but for the false and deceitful representation of the defendant hereinafter next mentioned, of which the defendant at the time of committing the grievance hereinafter mentioned had notice: and thereupon the defendant, so being a partner in the said firm of Darlincourt & Ladame as aforesaid, heretofore, to wit, on the 1st August, 1836, contriving and intending to deceive and

defraud the plaintiffs, and wrongfully, deceitfully, and fraudulently to induce, persuade, and encourage the plaintiffs to deal with the said firm in the way of their trade and business, and to sell and deliver to the said firm divers goods, wares, and merchandizes on trust and credit, falsely, fraudulently, and deceitfully then asserted and represented to the plaintiffs *that the said firm was trustworthy*: By means of which said false, fraudulent, and deceitful assertion and representation, the defendant did then and there fraudulently and deceitfully induce, persuade, and encourage the plaintiffs to deal with the said firm in the way of their said trade and business, and to trust and give credit to them in that behalf, and to sell and deliver to them divers goods, wares, and merchandizes upon trust and credit. Averment—that the said plaintiffs, confiding in and giving credit to the said assertion and representation of the defendant, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the day and year last aforesaid, and for a long time, to wit, until the 1st December, 1836, aforesaid, deal with the said firm in the way of their trade and business, and did trust and give credit to them in that behalf, and did sell and deliver to them divers goods, wares, and merchandizes, to a large amount, to wit, to the amount of 3,000*l.*, upon trust and credit, and did also, during the period last aforesaid make certain payments for and on account and for the use of the said firm, at their request, to a certain other large amount, to wit, to the amount of 500*l.*; whereas in truth and in fact, at the time of the defendant making his said assertion and representation, the plaintiffs could not safely trust and give credit to the said firm, nor could the plaintiffs safely sell and deliver to them any goods, wares, and merchandizes upon trust and credit, nor were they then trustworthy; and the defendant, when he so made his said last-mentioned assertion and representation, well knew the same: that the said firm had not, nor had any other per-

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son on the behalf of the said firm, paid to the plaintiffs the said several sums of money so due to the plaintiffs for the said goods, wares, and merchandizes, and for money so by them paid as aforesaid, or any part thereof, but, on the contrary thereof, the said firm was and still is wholly unable to pay the same, or any part thereof, to the plaintiffs, and the same was wholly lost to the plaintiffs.

The second count was trover for thirty tons of tin and thirty tons of other metal.

The defendant pleaded—first, not guilty to the whole declaration: secondly, to the first count, that the alleged grievance in that count mentioned was a representation alleged to have been made by the defendant to the plaintiffs, concerning the credit and ability of certain persons trading under the firm of Darlincourt & Ladame, to the intent that the said firm of Darlincourt & Ladame might obtain credit for [with] the plaintiffs thereupon; and that such representation was not made in writing signed by the defendant according to the form of the statute in such case made and provided—verification: thirdly, to the second count, that the goods and chattels in the said second count mentioned were not the property of the plaintiffs in manner and form as they had above in the said second count in that behalf alleged—concluding to the country.

The plaintiffs joined issue on the first and third pleas, and demurred specially to the second; assigning for causes—that the defendant had attempted in and by that plea to set up by way of answer to the first count the fact of the said deceitful representation therein mentioned not being in writing, although it appeared in and by the said first count that the said representation of the defendant was by him made as to the credit and ability of the said firm therein and in the said second plea mentioned, and although it further appeared from the said first count that the defendant, then being a member of and partner in the said firm, the same representation was in effect one as to

the credit and ability of the defendant himself, and not as to that of other third parties, the plaintiffs not seeking to charge the defendant in this action for and in respect of any merely collateral representation as to the circumstances of third parties, or for and in respect of any engagement made by the defendant to answer for the debt of third parties, but for and in respect of a deceitful representation as to his original and primary trustworthiness and credit.

The defendant joined in demurrer (50).

Barstow, in support of the demurrer.—The precise question presented for the judgment of the court in this case has never before arisen; but it falls within the general principle of law, that fraud accompanied by damage gives a right of action—Comyns's Digest, *Action upon the Case for a Deceit*, (A. 1); *Pasley v. Freeman*, 3 T. R. 51; *Haycraft v. Creasy*, 2 East, 92; *Dobell v. Stevens*, 5 D. & R. 490, 3 B. & C. 623 (51).

(50) The points marked for argument were as follow :—

For the plaintiffs—"That the defendant, being a partner in the firm whose credit he misrepresented, is chargeable in this action, though his statement may not have been in writing."

For the defendant—"That the declaration does not disclose any cause of action, and that nothing more is alleged than that the defendant has made a false affirmation as to his own and his partners' credit and means of payment and solvency."

(51) See *Lyde v. Barnard*, 1 M. & Welsby, 101. That was an action against the defendant for falsely representing that the life interest of A. B. in certain trust funds of which the defendant was trustee, was

charged with only three annuities, whereby the plaintiff was induced to advance a sum of money for the purchase of an annuity from A. B., secured by his bond &c., and also by an assignment of such trust funds; whereas the defendant at the time he made such representation, well knew that the same funds were also charged with a mortgage for 20,000*l*. At the trial it appeared that the representation was made, if at all, by parol. Lord Abinger, C. B., and Gurney, B., were of opinion that this was a representation concerning or relating to the credit and ability of A. B., so as to come within the 9 Geo. 4, c. 14, s. 6; Parke, B., and Alderson, B., were of opinion that it was not.

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 s. 6.

The plea is founded upon the 6th section of the 9 Geo. 4, c. 14, which enacts "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any *other person*, to the intent or purpose that *such other person* may obtain credit, money, or goods upon (52), unless such representation or assurance be made in writing, signed by the party to be charged therewith." The present case is not within the mischief intended to be remedied by the statute, which is confined to cases where by the statute of frauds, 29 Car. 2, c. 8, the contract is necessarily in writing. Here, the defendant might have bound himself and his partners by a contract without writing; and consequently no writing can be necessary to render the defendant responsible for a false representation of this nature.

Petersdorff, *contra*.—The court will be slow to decide that a false representation of a party as to his own trustworthiness furnishes a ground of action. The cases cited are either cases of misrepresentation as to the responsibility of third persons, or representations upon the sale of goods, which create no liability unless they amount to a warranty. A bare affirmation of a fact not falling within the description above suggested, however unfounded, affords no ground of action—*Rolle's Abridgment*, 101, pl. 16; *Chandler v. Lopus*, Cro. Jac. 4; *Roswell v. Vaughan*, Cro. Jac. 196; *Bayley v. Merrell*, Cro. Jac. 386. If this action were held to be maintainable, every creditor would have a twofold remedy against his debtor, wherever any representation was made as to the latter's means of fulfilling his engagements. Suppose the present plaintiff recovers judgment in this action, in

(52) See the observations of the statute, in *Lyde v. Barnard*, Parke, B., upon this inaccuracy in 1 M. & Welsby, 115.

which the jury may or may not award damages equivalent to the value of the goods, and he afterwards thinks proper to sue in assumpsit for the price of the goods, could the defendant plead as a bar the recovery in the former action? An action may even now be pending for the goods sold. The rights of a defendant are not to be varied by the substitution of one form of action for another—*Jennings v. Rundall*, 8 T. R. 335. In *Pasley v. Freeman* and *Haycraft v. Creasy*, the plaintiffs could have had no remedy at all unless by an action ex delicto: whereas here the plaintiff has an adequate remedy of another description. The declaration here charges the representation to have been made as to the credit and trustworthiness of the firm of which the defendant is a member. Although he be a component part of the firm, the representation is still a representation as to the character and credit of "other persons" within the meaning of the 9 Geo. 4, c. 14, s. 6.

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Barstow, in reply.—The defendant is identified with the firm. Suppose the declaration had alleged that he made the representation in question as to his own credit and solvency, and at the trial it appeared that the representation was made as to a firm of Steinkeller & Co., would this be a variance? It is not the less a representation as to his own trustworthiness, because he is speaking of himself as well as of others. With respect to the difficulty suggested as to the possibility of the plaintiff recovering the price of the goods and damages for the tort at the same time, it is enough to say that the same difficulty might be presented in the case of an action against the sheriff for an escape; for, there is no legal bar to the plaintiff's recovering the debt, after he has recovered damages in an action against the sheriff.

TINDAL, C. J.—In the view I take of this case, it is unnecessary to consider the objections urged to the declar-

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ation. I therefore give no opinion as to whether or not an action in this form is maintainable upon such a representation; for, it appears to me, that, if the action be maintainable, the plea is a sufficient answer to it. The stress of the argument on the part of the plaintiff is, that the 6th section of the 9 Geo. 4, c. 14, is in effect confined to cases where by the statute of frauds, 29 Car. 2, c. 3, the contract must have been in writing; that is, that the clause above referred to is subsidiary to the statute of frauds: and it is contended, that, as this defendant might have bound himself and his partners without a contract in writing, he may be responsible for a representation like this though not in writing. It does not, however, appear to me that the 9 Geo. 4, c. 14, s. 6, is so confined. It is somewhat remarkable that the statute of frauds is for the first time recited in the 7th section. The 6th section provides that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith." The declaration states that the representation was made by the defendant alone, and that he was in partnership with two other persons therein named: and the representation alleged to have been made is that the firm was trustworthy—that is, that each and every member of the firm was a trustworthy person. Now, if the representation had been made with reference only to the other two members of the firm, it could not for a moment have been doubted that the case would have been within the words and intention of the statute: and how is it less a representation as to the solvency and credit of the two, because it embraces the defendant himself? It appears to me that this clearly was

a representation touching the character and credit of persons who are no parties to the action, and therefore that the plea is a good answer, and the defendant entitled to judgment.

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BOSANQUET, J.—I was much struck with the observation made on the part of the plaintiff, that the object of the 9 Geo. 4, c. 14, s. 6, was, to give further effect to the statute of frauds. The 9 Geo. 4, c. 14, begins with a recital of the statute of limitations, 21 Jac. 1, c. 16; and the first four sections relate to acknowledgments or promises to take a case out of that statute. The 5th section applies to the confirmation of promises made by infants. Then comes the 6th section, which relates to representations as to the character and credit of third persons: and it is only in the following clause that the statute of frauds is for the first time mentioned; the object of its recital there being to extend the provisions of the 17th section of the statute of frauds to executory contracts of the value of 10*l.* and upwards, and to carry into effect the spirit of that act as to certain other things not relating to the present subject of inquiry. I am clearly of opinion that the present case falls within the words and the spirit of the 6th section. The declaration states that the defendant and two other persons, naming them, carried on the business of merchants in partnership, under the firm of Darlincourt & Ladame, and that the defendant falsely, fraudulently, and deceitfully represented that the *firm* was trustworthy. It would be extraordinary to hold that the statute might be defeated by shewing that the defendant was a partner in the firm whose credit and solvency he had misrepresented. It was undoubtedly a representation as to the character of "other persons," as well as of himself, in order that they might obtain credit: and it is not excluded from the statute because he himself is a participator in the fruits of his own fraud.

Boileau *was seised or well entitled for an estate for his own life* of or to the said chambers or apartments and hereditaments in Lincoln's Inn aforesaid, hereinbefore and hereinafter described, and intended to be thereby charged and granted and released—he, the said Simeon John Boileau, in consideration of the sum of 498*l.* duly paid by the said Thomas Flight to the said S. J. Boileau, did give, grant, bargain, sell, and confirm, unto the said Thomas Flight, his executors, administrators, and assigns, an annuity or clear yearly rent of 52*l.* 10*s.*, to be paid to the said Thomas Flight, his executors, administrators, and assigns, during the term of ninety-nine years, if the said Simeon John Boileau should so long live, and to be charged upon and yearly issuing out of the said chambers as aforesaid, and which in the said indenture were described to be in the possession or occupation of the said S. J. Boileau, and to which he was admitted by the Honorable Society of Lincoln's Inn, for his own life, on the 11th May, 1832, according to an order made at a council held the same day: To have, hold, receive, and take the said annuity or yearly rent of 52*l.* 10*s.* unto the said Thomas Flight, his executors, administrators, and assigns, thenceforth during the term of ninety-nine years, if the said S. J. Boileau should so long live, and to be paid and payable by equal quarterly payments on &c. in every year, without any deduction whatsoever for or on account of any present or future taxes, rates, or assessments, or any other matter whatsoever; and in and by the said indenture powers of distress and entry in case the said annuity or yearly rent was in arrear for the spaces of time therein mentioned, were reserved and provided: and, for the considerations therein mentioned, the said S. J. Boileau, by the direction of the said Thomas Flight, did grant, bargain, sell, release, and confirm unto the said Jonathan Marchant (in his actual possession then being, as alleged in the said indenture, by virtue of a bargain and sale to him thereof made by the said S. J. Boileau, in consideration of 5*s.*, by an in-

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indenture dated the day next but one before the date of the said indenture, for the term of one year commencing from the day next before the date of the said indenture of bargain and sale, and by force of the statute for transferring uses into possession), his executors, administrators, and assigns, all those the said chambers hereinbefore described and thereby charged with the said annuity or yearly rent of 52*l.* 10*s.*, together with the appurtenances to the same belonging or in anywise appertaining; and the reversion and reversions, yearly and other rents, issues, and profits thereof; and all the estate, right, title, interest, use, trust, property, possibility, claim and demand whatsoever, at law and in equity, of him the said Simeon John Boileau into or upon the said premises—to have and to hold the said chambers and other the premises thereinbefore granted and released, with the appurtenances (but subject and charged as aforesaid), unto and to the use of the said Jonathan Marchant, his executors, administrators, and assigns, during the natural life of the said S. J. Boileau, and for all the estate, term, and interest of him the said S. J. Boileau therein, but upon the trusts therein mentioned concerning the same—which were, in fact, to support the said annuity and charge: and in the said indenture was also contained a clause for re-purchase of the said annuity by the said S. J. Boileau, if he should be minded so to do.

The annuity deed was duly registered in the High Court of Chancery, pursuant to the acts of parliament for the registration of deeds in the county of Middlesex, concerning conveyances in the county of Middlesex, and a memorial thereof duly inrolled in the High Court of Chancery, pursuant to the act of parliament in that case made and provided.

Afterwards, in Michaelmas Term, 1836, the defendant, on being applied to at his chambers, stated that he had purchased the property of Mr. Boileau; and Mr. Boileau gave up possession of the said chambers in manner here-

after mentioned to the defendant: and the defendant took possession of the same.

The annuity was in arrear when this action of ejectment was commenced.

The defendant gave in evidence the following deeds:—
Indentures of lease and release bearing date respectively the 1st and 2nd March, 1786, and made between William, Earl of Mansfield, of the one part, Fletcher, Lord Grantley, William Pitt, &c., &c., Benchers of the Honorable Society, of the other part, whereby the estates of Lincoln's Inn, of which the said chambers were part, were conveyed to the persons of the second part, in fee, in trust, nevertheless, for and for the only benefit of the said Society of Lincoln's Inn, in fee; and two others, shewing that by divers mesne assignments the said estates of the said Society of Lincoln's Inn became and are now vested in Sir Lancelot Shadwell, &c., &c., on the same trusts.

The chambers in question are part and parcel of Lincoln's Inn, the fee-simple of which, on the day of the demise in the declaration, was vested in the last-named parties, in trust for the said Society.

According to the regulations of the Society, persons admitted to chambers in the Inn must be members of the Inn before they are admitted as hereinafter mentioned; and the only course of admission to chambers is as follows:—The person last admitted presents a petition to the Masters of the Bench for the time being, for permission to surrender his chambers, first paying all his arrears of dues and duties, and that the person who is to succeed him may be admitted thereto for his own life; and the party who is to succeed also presents a petition to the said Masters to be so admitted: and thereupon, if they consent to the petition, an order is made that the person then admitted may have leave to surrender, and that the person who is to succeed may be admitted, on paying the fine and fees. It is in the discretion of the said Masters for the time being to make such orders respecting the admis-

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sion to or exclusion from chambers in the Inn as they may think fit. The petitions and orders hereafter set forth are in the usual form. When new admissions are granted, the old admissions are not delivered up or inquired for. A copy of the order of the Masters is given to the party admitted, setting forth that he has paid his alienation fine.

The conveyances of the fee to new trustees are prepared according to an order of the Masters, and are executed at uncertain periods, and when the deaths of many of the last trustees render the appointment of new trustees expedient.

Admission of
Boileau.

In Easter Term, 1832, Francis Burnside, Esq., a barrister and member of Lincoln's Inn, was the person admitted to the chambers in question; and in that term he and the said Simeon John Boileau, who was also such barrister and member, presented petitions to the Masters of the Bench, and on the 11th May in that year the order was made—see note 53.

The parties named in the order as having been present at the council at which the order was made, were all Masters of the Bench of Lincoln's Inn.

In Michaelmas Term, 1833, the said S. J. Boileau and the defendant, being respectively barristers and members of Lincoln's Inn, presented their petitions to the Masters of the Bench (53), and, on the 25th November, 1833, an

(53) The following are copies of the petitions and orders referred to, and which it was agreed should form part of the case.

Burnside's petition.

" Lincoln's Inn,

" Easter Term, 1832.

" To the Worshipful Masters of the Bench,

" The petition of Francis Burnside, Esq., a Barrister of this Society,

" Sheweth,

" That your petitioner hath one whole chamber situate on the West side of the staircase on the ground floor at No. 24 in Gatehouse Court and Stone Pace Row, in the Old Buildings, which he is desirous to surrender to Simeon John Boileau, Esq., a barrister of this Society.

order was made—see note 53, and the persons named in the order as having been present at the council at which

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“ Your petitioner, therefore, prays your worships will be pleased to permit him to surrender his said chamber, first paying all his arrears of dues and duties, and that the said S. J. Boileau may be admitted thereto for his own life, on paying the usual fine and fees to the treasurer of this Society.

“ And your petitioner will pray, &c.

“(Signed) FRANCIS BURNSIDE.”

“ Lincoln’s Inn,

“ Easter Term, 1832.

Boileau’s petition.

“ To the Worshipful Masters of the Bench,

“ The petition of Simeon John Boileau, Esq., a Barrister of this Society,

“ Sheweth,

“ That your petitioner is desirous of being admitted for his own proper use and benefit to one whole chamber situate on the West side of the staircase on the ground floor at No. 24 in Gatehouse Court and Stone Pace Row, in the Old Buildings, in the room and stead of Francis Burnside, Esq., a barrister of this Society, he not being proprietor of any other chamber.

“ Your petitioner, therefore, prays your worships will be pleased to admit him to the said chamber for his own life, on paying the usual fine and fees and all his arrears of dues and duties to the treasurer of this Society.

“ And your petitioner will pray, &c.

“(Signed) S. J. BOILEAU.”

“ Lincoln’s Inn.”

“ At a Council there held the 11th day of May, 1832, present Nathaniel G. Clarke, Esq., &c. &c. Order thereon.

“ Upon the petition of Francis Burnside, Esq., a barrister of this Society, setting forth that he hath one whole chamber situate on the West side of the staircase on the ground floor at No. 24 in Gatehouse Court and Stone Pace Row, in the Old Buildings, which he is desirous to surrender to Simeon John Boileau, Esq., a barrister of this Society; and upon the petition of the said S. J. Boileau, praying to be admitted to the same, for his own life, in the room and stead of the said Francis Burnside, he not being proprietor of any other chamber: it is ordered, that the said Francis Burnside shall have leave to surrender his said chamber, first paying all his arrears of dues and duties to the treasurer; and that the said S. J. Boileau be admitted thereto for his own life on paying the usual fine and fees and all his arrears of dues and duties to the trea-

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the order was made were all Masters of the Bench of Lincoln's Inn.

surer, with the customary fees to the officers of this Society, within one month from the date hereof, or this order to be void."

Boileau's petition for leave to surrender to the defendant.

" Lincoln's Inn.

" Michaelmas Term, 1833.

" To the Worshipful Masters of the Bench,

" The petition of Simeon John Boileau, Esq., a Barrister of this Society,

" Sheweth,

" That your petitioner hath one whole chamber, situate on the West side of the staircase, on the ground floor, at No. 24 in Gatehouse Court and Stone Pace Row, in the Old Buildings, which he is desirous to surrender to John Errington, Esq., a barrister of this Society.

" Your petitioner, therefore, prays your worships will be pleased to permit him to surrender his said chamber, first paying all his arrears of dues and duties, and that the said John Errington may be admitted thereto for his own life, on paying the usual fine and fees to the treasurer of this Society.

" And your petitioner will pray, &c.

" (Signed) S. J. BOILEAU."

Errington's petition.

" Lincoln's Inn.

" Michaelmas Term, 1833.

" To the Worshipful Masters of the Bench,

" The petition of John Errington, Esq., a Barrister of this Society.

" Sheweth,

" That your petitioner is desirous of being admitted, for his own proper use and benefit, to one whole chamber situate on the West side of the staircase, on the ground floor, at No. 24 in Gatehouse Court and Stone Pace Row, in the Old Buildings, in the room of Simeon John Boileau, Esq., a barrister of this Society.

" Your petitioner, therefore, prays your worships will be pleased to admit him to the said chamber, for his own life, on paying the usual fine and fees and all his arrears of dues and duties to the treasurer of this Society.

" And your petitioner will pray, &c.

" (Signed) JOHN ERRINGTON."

Order thereon.

" Lincoln's Inn.

" At a Council there held the 25th day of November, 1833, present William Selwyn, Esq., &c. &c.

" Upon the petition of Simeon John Boileau, Esq., a barrister of this Society, setting forth that he hath one whole chamber situate on the West

The defendant paid his alienation fine; and a copy of the Benchers' order was delivered to the defendant, which also stated, as the fact was, that he had paid his said fine. The defendant entered upon the chambers, and has held them ever since.

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The question for the opinion of the court was—whether the plaintiff was entitled to recover in this ejectment; and, if so, then the verdict for the plaintiff was to stand; otherwise, a nonsuit to be entered.

Hoggins, for the lessor of the plaintiff.—The lessor of the plaintiff claims under a conveyance by lease and release from Boileau. The defendant also claims under Boileau by surrender. The trustees of the Society of Lincoln's Inn, in whom the legal estate is vested, are no parties to the present dispute. The plaintiff's right to recover rests upon estoppel. Boileau, having by the indenture of the 29th July, 1833, recited that he was seised of an estate for life, and, having conveyed to the lessor of the plaintiff all his interest in the premises, is estopped from saying that he had no life estate—*Trevivan v. Lawrance*, 1 Salk. 276, 2 Ld. Raym. 1036. There, in ejectment upon the demise of R. V. a special verdict was found, viz. that S. R. was seised in fee of the lands in question, and that, being so, H. M. recovered judgment against him in debt for 127*l.* in the King's Bench, in Michaelmas Term, 1656, which they find

side of the staircase, on the ground floor, at No. 24 in Gatehouse Court and Stone Pace Row, in the Old Buildings, which he is desirous to surrender to John Errington, Esq., a barrister of this Society; and upon the petition of the said John Errington, praying to be admitted to the same, for his own life, in the room and stead of the said S. J. Boileau, he not being a proprietor of any other chamber: it is ordered that the said S. J. Boileau shall have leave to surrender his said chamber, first paying all his arrears of dues and duties; and that the said John Errington be admitted thereto, for his own life, on paying the usual fine and fees and all his arrears of dues and duties to the treasurer, with the customary fees to the officers of this Society, within one month from the date hereof, or this order to be void."

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in hæc verba: That, in Hilary Term, 13 W. 3, the lessor of the plaintiff, as administrator of the said H. M., sued a scire facias, reciting the judgment as of Trinity Term against the terretenants of the lands which the said S. R. had on the day of the judgment recovered or at any time afterwards; that the terretenants (of whom the defendant was one) appeared and pleaded nul tiel record, and issue joined thereupon, and a day was given to bring in the record; at which day the record of the judgment of Michaelmas Term, 1656, was produced, and judgment given quoad habetur tale recordum, and execution awarded; that thereupon the plaintiff sued out an elegit, upon which an inquisition was taken, and the lands in question extended: and for a variance between the judgment recited in the scire facias and that given in evidence, the jury doubted. The Court held, "not only that the parties, but all claiming under them, on this recovery, would be bound by this estoppel: as, if a man makes a lease by indenture of D. in which he hath nothing, and after purchases D. in fee, and after bargains and sells it to A. and his heirs; A. shall be bound by this estoppel: and that, where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel." The defendant claiming under Boileau is equally estopped. [*Tindal*, C. J.—Boileau would be estopped from saying that he was not admitted: but the question is what was the operation and effect of that admission. The defendant does not claim by any interest in Boileau: he claims under the Society.] The defendant obtains the estate by the act of Boileau, the surrenderor. How, then, can it be said that he does not claim under him? In Co. Litt. 59. b., it is said that "the surrender to the lord is to be general, without expressing of any estate, for that he is but an instrument to admit cestui que use, for, no more passeth to the lord but to serve the limitation of the use; and cestui que use, where he is admitted, shall be in by him that made the surrender, and not by the

lord." [Tindal, C. J.—This is not like the case of a surrender of a copyhold, which is a mode of conveyance known to the law. *Coltman*, J.—At law, Boileau's interest was merely that of a tenant at will: and a surrender by a tenant at will is a determination of the will.] Estoppel may be by matter in pais—Comyns's Digest, *Estoppel*, (A. 3). In *Right d. Jefferys v. Bucknell*, 2 B. & Ad. 281, Lord Tenterden states an estoppel precisely in the form of the recital in this deed. *Bensley v. Burdon*, 2 Sim. & Stu. 519, upon which his lordship was commenting, is exactly analogous to the present case.

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R. V. Richards, contra, was stopped by the Court:—

TINDAL, C. J.—This case has very properly been argued on the ground of estoppel; for, if it were a question of title, the lessor of the plaintiff would clearly be out of court. Boileau had nothing, at law, but a bare tenancy at will: and, whatever ground he might have for expecting that such his estate would enure for his life, that expectation was put an end to by his own act of surrender and the consequent admission of the defendant. The lessor of the plaintiff, therefore, can only claim under the estoppel created by the deed of July, 1833. Privies in estate only are bound by an estoppel. The first rule laid down by Lord Coke upon the subject is as follows—Co. Litt. 352. a. "That every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason that regularly a stranger shall neither take advantage nor be bound by the estoppel: privies in blood, as the heir; privies in estate, as, the feoffee, lessee, &c.; privies in law, as, the lords by escheat; tenant by the curtesie, tenant in dower, the incumbent of a benefice, and others that come under by an act in law, or in the post, shall be bound and take advantage of estoppels." The question here is whether there is any privy of estate in the defendant. According to the

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old authorities, he must either come in in the pur or the post, that is, he must claim from, through, or under the party. It appears to me that the defendant does not claim from, through, or under Boileau, but from the trustees of the Society of Lincoln's Inn. The case appears to me to fall within that put by Sir W. Jones in *Edwards v. Rogers*, Sir W. Jones, 460—"If a father disseise his son, and levy a fine, this fine will not bind the son as heir and privy, for he does not claim from his father; or, if a father be tenant for life, remainder to his son in fee, and levy a fine, this will not bind the son as privy, for his reversion; or, if the father levy a fine of the lands of the mother, the son is not bound." For these reasons, I am of opinion that the estoppel in this case does not bind the defendant: and certainly estoppels are not to be favoured. Our judgment must be for the defendant.

BOSANQUET, J.—I am of the same opinion. The defendant does not derive any estate from Boileau, but from the owners in fee, and therefore cannot be bound by any act previously done by Boileau.

COLTMAN, J.—I am of the same opinion. As between Boileau and the lessor of the plaintiff, the former might be estopped from denying that he had the estate he represented by his deed. But, to entitle the lessor of the plaintiff to succeed in this ejectment, it was necessary for him to shew that the defendant claimed through or under Boileau, so that the estoppel should affect him. This he clearly does not. It is said that the facts at least amount to an estoppel in pais. But I cannot agree that the defendant is estopped to do anything more than deny the right of the Society to pass the estate to him in the manner they have done.

MAULE, J.—It is perfectly clear that the defendant,

who is not a privy in estate, is not bound by any estoppel as between Boileau and the lessor of the plaintiff.

Judgment for the defendant.

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BELCHER and Others, Assignees of THOMAS DRIVER, a Bankrupt, v. OLDFIELD.

Friday,
Nov. 15th.

THIS was an action of trover (53) which came on to be tried before the Right Honorable the Lord Chief Justice of this court, when a verdict was found for the plaintiffs, damages 110*l.*, subject to the opinion of the court on the following case:—

The plaintiffs were assignees of the estate and effects of Thomas Driver, who was captain or master of the ship called the Bolton, in the East India trade. The defendant

One D., the captain of a vessel belonging to the defendant, entered into an agreement with the defendant, under which he was to have the command of the vessel for a voyage to India and back, and to have for his own use the

cabin accommodation for passengers, for which he was to pay the owner a certain sum. For purposes of his own, D. abandoned the ship before her arrival in India, whereupon the command was assumed by F., the chief mate. After D. had left the ship, he wrote to F. giving him directions as to the disposal of certain property of his then on board. The owner, as soon as he became acquainted with the fact of D. having quitted the ship, wrote to F. confirming him in the command, and desiring him to retain everything on board belonging to D., who was largely indebted to him. D. returned to England, and on the 18th October, 1834, at the instance of the defendant, wrote him the following letter:—"I hereby authorize and request you to keep possession of all cabin furniture and other property of mine on board the Bolton when she arrives, and to place the value of the same to the credit of my account with you." On the 18th December, a fiat in bankruptcy issued against D. upon an act of bankruptcy committed by him on the 2nd. The vessel arrived in London on the 5th December:—Held, that the defendant had such a possession of the goods before the bankruptcy as to entitle him to retain them as against D.'s assignees, by virtue of the authority of the 18th October.

(53) The first count of the declaration alleged a finding *before* and a conversion by the defendant *after* the bankruptcy of Driver; the second, a finding and conversion *after* the bankruptcy.

The defendant pleaded—first, not guilty to the whole declaration—secondly, to the first count, that Driver was not at the time of his bankruptcy lawfully possessed as of his own property of the goods

and chattels in that count mentioned, or any or either of them, or any part thereof, nor did the same, or any or either of them, or any part thereof, belong or appertain to the plaintiffs, as assignees as aforesaid, after the said bankruptcy, modo et formâ—thirdly, to the second count, that the plaintiffs were not lawfully possessed as assignees &c.: upon each of which pleas the plaintiffs joined issue.

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was the owner thereof. This action was brought to recover the value of certain stores and furniture put on board at London for the use of the bankrupt and his passengers on the voyage from London to Calcutta, and which were the cabin furniture and other property referred to in the letter from the bankrupt to the defendant, dated the 18th of October, 1834, hereinafter [p. 228] set forth. In June, 1833, in contemplation of the said voyage, the bankrupt and the defendant entered into the following agreement:

Agreement of
June 14, 1833.

“Memorandum of agreement made the 14th June, 1833, between T. B. Oldfield, Esq., owner of the ship Bolton, of the one part, and Captain Thomas Driver of the other part.

“Mr. Oldfield agrees to appoint Captain Driver to the command of the ship Bolton on her present intended voyage to India and back to England, and the said Captain Driver agrees to take charge and accept the command of the said ship on the following terms:—Captain Driver is to have for his own use and benefit the cabin accommodations of the said ship for passengers; and, for the use of the same, and in lieu of all profits he may derive therefrom, he is to pay to the owner the sum of 2,000*l.*, 1,000*l.* to be paid on the ship's clearing at the Custom House here, and out of the remaining 1,000*l.* he is to pay the ship's disbursements in India, and the balance to be remitted in good bills on London. The said sum is to include the 12*l.* per head usually paid by commanders in the East India service, and denominated charterparty passage-money, and is to cover all claims of the owner on account of the said passengers; but, should Captain Driver draw any ship's provisions for the use of the cuddy beyond the allowance for himself and officers, he is to pay the owner for the same. The owner agrees to find sufficient water casks for the use of the passengers as well as the crew, and to allow Captain Driver sufficient room, without charge, for his cabin stores and passengers' baggage, the same to be only their common

baggage. Captain Driver is to be allowed 10*l.* per month wages from the time the ship is entered out at the Custom House until the discharge of the homeward cargo, and 8*l.* per month in addition so long as the ship victuals, for which he is to mess the chief and second officers and surgeon. The above wages are to cover and be in lieu of all primage upon the freight and all cabin and shore allowances whatsoever. The crew to consist of thirty-five persons, captain and officers all included. Should Captain Driver employ any of them as his servants, the owner to pay them seamen's wages, and Captain Driver to make up the difference. Should Captain Driver carry any additional men for servants, he is to pay the whole of their wages. The expense of advertising the ship for freight and passengers both in London and in India, to be paid half by the owner and half by Captain Driver. It is agreed that the ship shall sail from London some time in the ensuing month of September. Should any difference or dispute arise between the said parties as to the disbursements of the ship, or otherwise relative to this agreement, they hereby agree to refer the same to the arbitration of two indifferent persons, one to be chosen by each, and the two to appoint a third.

"T. B. Oldfield,

"T. Driver."

On the 22nd August in the same year a second agreement was entered into between the parties, as follows:—

"London, 22nd August, 1833.

"With reference to an agreement made the 14th June, 1833, between Captain Driver and Mr. T. B. Oldfield, it was intended by a voyage to India and back to England, that the ship Bolton should proceed direct to Calcutta, without touching anywhere, and return to England by way of Madras. But Captain Driver, having since engaged a party of passengers for Algoa Bay in South Africa, and another

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party for Madras, is desirous of leave to call at these places on his outward voyage, for the purpose of landing his passengers; and Mr. Oldfield consents, at Captain Driver's request, on the following terms:—That Captain Driver shall pay all pilotage and port-charges that may attach at both places, and also demurrage at the rate of 6*d.* per ton per day. The demurrage for calling at Algoa Bay to be computed from the time the ship first makes the land of South Africa until the time she finally leaves it; and the demurrage for calling at Madras to commence with the day she leaves Madras for Calcutta and to terminate when she arrives at Sangor. It is distinctly recognised that Captain Driver is at liberty to call at Madras on his homeward voyage, if the interest of the ship or his own interest should require it, without being subject to any charge for the same on the part of the owner.

“T. Driver,

“T. B. Oldfield.”

Abandonment
 of the ship by
 the captain.

Command as-
 sumed by the
 chief mate.

The said stores and furniture were bought and sent on board by and on behalf of and for the account of the bankrupt, and were his property. The bankrupt sailed from England in the command of the ship in September, 1833, and arrived at Algoa Bay in December following, at which place he left the ship for the purpose of attending to his own private concerns, without permission or authority from the defendant. The command of the ship was thereupon taken by the chief mate, Mr. Fremlin; and, when the ship was about to sail from Algoa Bay under his command, the bankrupt wrote and delivered to him the following letters:—

“Bolton, Algoa Bay, Dec. 24th, 1833.

Captain's letter
 to the chief
 mate.

“My dear Fremlin,—I find, that, to wind up my affairs with Mackintosh, I must stay at the Cape, and send the ship on under your command. Prior to my leaving England, I wrote him to furnish my friends Messrs. Thomson,

Watson, & Co., with a statement of the brig Lord Hobart's earnings, also to hand over to those gentlemen whatever funds he had of mine, and to write me to this place all particulars. This he has neglected to do, and I am compelled to leave the Bolton and go to Cape Town in a waggon, and there wind up the concern. As this may take some time, I have no alternative. It affords me pleasure to say that your conduct as an officer and seaman has so completely exceeded my expectation that I resign the command fully assured you will do as much for me and Mr. Oldfield as I could do if I proceeded. My engagement with Mr. Oldfield was, to pay 2000*l.* for the command. The whole of the passage-money is mine. His instructions to me I herewith hand to you.

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"You will see that I have paid Mr. Oldfield 1000*l.*, and with the remainder I am to disburse the ship in India, and remit him the balance. This you must do, from the sale of such goods as I herewith consign to you, and from the passage-money: and, to remunerate you, I place you on the same wages as I have got, viz. 10*l.* per month; and, as I shall find the cuddy, you shall have 20 per cent. on the net earnings of the passage-money home. This is the best terms I can afford to offer; and, if it meet with your idea of justice, say so. Mr. Oldfield, I have no doubt, will feel satisfied with your commanding the Bolton. He expressed himself much pleased with you; and said, if the ship had been taken up for convicts, you would have commanded her. I shall give you letters to my friends in India, who will gladly serve you for my sake. I now say farewell, wishing you a safe, and, for the good of all concerned, successful voyage."

"Thomas Driver."

"Algoa Bay, December 27th, 1833.

"My dear Fremlin,—There will be presented to you soon after your arrival an acceptance of mine for upwards
 Captain's letter to mate.

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of 2000 Sicca rupees; and also I promised to pay the balance of Powell's bill to Messrs. Bagshaw & Co., Calcutta, that is, as many rupees as would be equal to the amount sterling. This you must do from the proceeds of the felt, and whatever stores you may have to spare, which you will please to sell. Should these funds not be equal to the amount required, draw from the Sircar as much as will suffice for that purpose, and remit me on your arrival in India, on account of passage home, 500*l*. Should Messrs. Macintyre decline to give you a set of bills for that amount, draw money from the Sircar, and purchase a set of bills for that amount, and remit the same to me through the post-office to my house, No. 3, Pennell Terrace, Peckham, Surrey, England: but do not send two of the bills by the same ship or at the same time. Let there be a vessel sail between the first and second letter. You will also disburse the ship out of the passage-money. Mr. Oldfield's instructions, and all and every paper stating what freights were receivable in India, has been herewith handed over to you; and I agree to your having the command on the following terms—pay, 10*l*. per month, and 20 per cent. on the net profits on passengers home from Calcutta. The crockery, glass, hardware, and cooking utensils, plate, &c., to be considered on your reaching Calcutta to have reduced in value 33½ per cent.: this must so be placed to the ship's debit as cuddy stores; and, on her return to London, to be valued and placed to the credit of the cuddy accounts.

“You have also power of attorney to recover a large sum for me, which on your reaching Madras you will show Mr. Dare of the house of Parry, Dare, & Co. That gentleman will give you letter to Mr. Paulin, in Calcutta. Do your best for me in this matter, and I will reward you for the trouble you may take on my account. The ship is now fully stocked for the voyage, and I hope for all our sakes it may be prosperous.

“Thomas Driver.”

The defendant on the 30th April, 1834, wrote the following letter to Fremlin, the chief mate, and addressed it to him at St. Helena, which he received on the arrival of the ship at that place on her homeward voyage, in the month of October, 1834.

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" 10 George Yard, Lombard Street,

" 30th April, 1834.

" Dear Sir,—I have just received a letter from Captain Driver, informing me of his having left the Bolton at Algoa Bay to attend to his own private affairs at the Cape, and of the ship having gone forward on her voyage under your command. I do not know what arrangements Captain Driver has made with you; but I have such perfect confidence in you that I am under no apprehension for the result.

Owner's letter
 of April 30,
 1834.

" It is too late for me to forward any instructions to you in India: but I am desirous of taking the first opportunity to advise you to retain in your own hands any property whatever, money or goods, which you have belonging to Captain Driver. You will probably have a private account to settle with him. I shall have a large account to settle with him, in which he will most likely be deeply in my debt: and it will be difficult for you to know what monies or property belong to him, and what to me as owner of the ship. You will be, therefore, incurring a most serious responsibility if you give up anything either to him or to anybody before you know exactly how matters stand, and which you cannot know till you arrive in London.

" I hear that he intends to rejoin the ship at St. Helena, on her return home. Should he wish to do this, you must receive him on board only as a passenger. I hereby confirm you in the command of the ship, and I forbid you to give it up to him or any person whatever. I hope the voyage may yet turn out profitable both to you and to me;

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and that I shall have the pleasure of seeing you command the Bolton for many years to come.

"T. B. Oldfield."

"Please write me fully on the whole state of affairs without delay."

On the 24th September, 1834, the defendant again addressed and sent to Fremlin (inclosed to Messrs. Goodwin, Curling, & Co., Deal,) another letter as follows:—

"London, 24th September, 1834.

Owner's letter
 of Sept. 24,
 1834.

"Dear Sir,—I wrote to you at St. Helena: but, least you should not have received my letter, I write again to request that you will not deliver any accounts, papers, bills, or anything whatever, to Captain Driver, or to any one else, until I have seen you, which I hope to do (as early as you can make it convenient) in good health.

"T. B. Oldfield."

The ship, under the command of the mate (Fremlin), proceeded to Madras and Calcutta, and thence back to England; and the bankrupt returned to England previously to the month of October, 1834, and before the ship arrived. On the 24th September, 1834, the bankrupt, then in England, dishonoured an acceptance which he had given to one George Brown for 496*l.* 5*s.* 2*d.*, and which debt was subsequently proved by Brown under the fiat of bankruptcy against him. On the 18th of October, 1834, the bankrupt, at the instance of the defendant, both of them being in London, and in personal communication with each other, wrote and delivered to the defendant the following letter:—

"London, October 18th, 1834.

Captain's letter
 of Oct. 18,
 1834.

"Sir,—I hereby authorize and request you to keep possession of all cabin furniture and other property of mine on board the Bolton when she arrives, and to place the value of the same to the credit of my account with you.

"Thomas Driver."

The fiat in bankruptcy against Driver was issued on the 18th December, 1834, on an act of bankruptcy committed on the 2nd December in that year. The ship arrived in England on the 5th December, 1834. She was immediately boarded, on behalf and by the authority of the defendant, by the ship's husband. At the time when the above-mentioned letter of the 18th of October, 1834, was written and delivered to the defendant as above-mentioned, and at the time of the arrival of the ship Bolton in England as aforesaid, the bankrupt was indebted to the defendant, on the balance of accounts between them, in a sum exceeding the value of the said furniture and other property referred to in the said letter of the 18th October, 1834.

The whole of the officers and crew were appointed, paid, and victualled, at the sole expense of the defendant. The plaintiffs, previously to the commencement of the action, duly demanded possession of the said stores and furniture from the defendant, which he refused to deliver up.

The court was to decide whether the plaintiffs, as assignees of Driver, were entitled to recover; and, if so, the verdict was to stand, otherwise a nonsuit to be entered (54).

Hoggins (*Wilson* was with him), for the plaintiffs.—Under the original agreement between the defendant and Captain Driver, the latter, independently of the command

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Bankruptcy of
captain, and
subsequent pro-
ceedings.

Demand and
refusal.

Question.

(54) The points marked for argument were as follow:—

For the plaintiffs:—"1. That the defendant acquired no lien on the bankrupt's effects, and that they remained part of the bankrupt's property and effects up to and at the time of his bankruptcy. 2. That possession of the bankrupt's property never passed to the defendant, so that any lien could attach.

3. That the goods were in the order and disposition of the bankrupt at the time of his bankruptcy."

For the defendant:—"That the letter of the 18th October, 1834, authorized the defendant to retain the property therein referred to, and to apply the same in discharge of his debt; and that the same was not revoked by the bankruptcy of Driver."

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of the vessel, was to have possession of the cabin accommodations for passengers, and to pay a rent of 2000*l*. Suppose the defendant, when the ship arrived at Algoa Bay, had boarded her, though he might have deposed the captain, he could not have deprived him of the possession of those parts of the vessel that are usually devoted to passengers. On Driver's quitting the ship, he resigned the command to Fremlin, the chief mate, constituting him his agent with regard to the cuddy and stores. This being the state of things, Captain Driver, by a letter of the 18th of October, 1834, gives the defendant the authority upon which he founds his right to retain the cabin furniture and stores as against the claim of Driver's assignees—an authority to keep possession of the goods on board belonging to Captain Driver on the arrival of the vessel in London. There is no mutuality: the defendant does not engage to receive the goods in satisfaction of so much of his claim; he might at any time repudiate the transaction. No interest passed by the letter, either by way of lien, or by way of sale, legal or equitable. No lien could attach, for the goods were never in fact in the defendant's possession. Fremlin, though the agent of the defendant as far as the command of the ship was concerned, was still the agent of Captain Driver with reference to the cabin furniture and stores. And there clearly was no sale; for, if the goods had been lost at sea, the loss would unquestionably have been borne by Driver. [*Maule, J.*—The expression "*keep possession*," would seem to imply that the parties understood that the defendant *had* possession at the time.] Construing the words according to the manifest intention of the parties, "*keep*" cannot possibly have greater force than "*take*." The authority clearly was revocable by Captain Driver, and his bankruptcy revoked it: "The bankrupt had no power to make a contract which after his bankruptcy should vest in other persons property which upon his bankruptcy vested in his assignees"—per Lord

Abinger, in *Tripp v. Armitage*, 4 M. & Welsby, 699. [*Tindal*, C. J.—The real question is, whether Fremlin was not in possession of the goods as agent of the defendant.] There was no agreement or attornment, or express assent on the part of Fremlin to hold the goods as the agent of the defendant, which, according to *Williams v. Everett*, 14 East, 582, and *Brind v. Hampshire*, 1 M. & Welsby, 365, was necessary. Fremlin owed a duty both to the defendant and to Captain Driver, viz. to account to each for that portion of the ship which for the purposes of the voyage belonged to each.

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Peacock, for the defendant.—The agreement on the part of the defendant that Captain Driver should have the cabin accommodations, formed part of the consideration for his services as commander of the vessel; and, when he abandoned her, the agreement was at an end; he then had no more right to retain possession of the cabins than anything else connected with the command. That this was Captain Driver's own construction of the agreement, is clear from his letter to Fremlin, in which he says—"I am to pay Mr. Oldfield 2000*l.* for the command." The master of a vessel is bound to devote the whole of his time and his energies to the service of his owner, and is not at liberty to enter into any engagement for his own benefit that may occupy any portion of his time in other concerns—Abbott on Shipping, 5th edit., 132. He has no power to delegate his authority to another. If he die or desert the ship, it is the duty of the chief mate to assume the command. And here the case expressly states that Fremlin did assume the command as soon as Captain Driver left the ship, and before he received his letter of instructions. From that moment, Fremlin became the owner's agent, and Driver ceased to have any power or control over the vessel or any part of her. As soon as the owner is informed of what has taken place, he writes to Fremlin, con-

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firming him in the command, and desiring him to retain possession of all the property in the ship. The letter of the 18th October, 1834, assumes that the defendant is already in possession of the goods by his agent: it authorizes him to *keep* possession. And this letter being an authority coupled with an interest, it was not revocable by Captain Driver before his bankruptcy, nor was it revoked by the bankruptcy—*Walsh v. Whitcomb*, 2 Esp. 565. *Williams v. Everett* and *Brind v. Hampshire* were cases of a mere authority without an interest. Assuming that Fremlin was in possession of the goods as the defendant's agent, the letter operated as an equitable assignment, or conveyed to the defendant at the least an equitable lien, which would be good as against the assignees—*Winch v. Keeley*, 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40. An assignment of a debt requires not for its validity in equity a contract with the debtor—*Ex parte South*, 3 Swanst. 393. *Bailey v. Culverwell*, 2 M. & R. 564, 8 B. & C. 448, very nearly resembles this case. There, Culverwell & Co., as brokers for Carrol, sold goods then in their possession, to Halliwell, which were paid for by a bill drawn by Halliwell and accepted by Walduck. Halliwell ordered Culverwell & Co. to keep the goods in their hands, and sell them if they could make a certain profit. Before the bill became due Walduck failed, and Culverwell & Co. applied to Halliwell for security for the bill; whereupon he gave them an order to sell the goods and apply the proceeds in payment of the bill. Halliwell afterwards, and before the goods were sold, became bankrupt. Culverwell & Co. handed over the goods to Carrol, at his request, but he afterwards returned them; and, after they were returned, Halliwell's assignees, having made a demand of the goods, brought trover. The court held that they could not maintain it; for, after the order given by Halliwell to Culverwell & Co. to sell the goods and apply the proceeds in payment of the bill, they remained in their hands subject to that charge, because Culverwell & Co.

must be presumed to have asked security as agents for Carrol, whose ratification of their act for his benefit might also be inferred. In answer to an argument that was urged in that case, and has been repeated here, that the goods were not remaining at the defendant's risk, Bayley, J., says: "In every case of a lien the goods are at the risk of the owner, and not of the party claiming the lien." Goods at sea may form the subject of an assignment—*Wright v. Campbell*, 4 Burr. 2046; *Haille v. Smith*, 1 B. & P. 563; *Lempriere v. Pasley*, 2 T. R. 485.

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Hoggins, in reply.—The question is whether the letter of the 18th October, 1834, amounted to a legal or equitable assignment of the goods to the defendant. To have this operation, it must convey some fixed and certain right. This is the distinction pointed out by Parke, B., in *Tripp v. Armitage*, 4 M. & Welsby, 702, where he says:—"It is not as if it were the case of a fixed bargain before the bankruptcy, giving certain interest in these chattels to the defendants, and which the assignees must take subject to that interest; but it is uncertain whether the option of the defendants will be exercised or not, and in the meantime the effect of the bankruptcy is to transfer the property to the assignees." That is precisely the situation of the parties here. The defendant might have repudiated the authority given to him by Driver's letter. To operate as an equitable assignment, there must at least be a contract binding both parties. [*Tindal*, C. J.—Supposing it to operate only as an equitable mortgage, would the assent of both parties be necessary? *Maule*, J.—A pawnbroker is not *bound* to keep a pledge until the sum advanced upon it is repaid: does it therefore follow that he has no *right* to do so?] This is not the case of a pledge. No doubt, on the desertion of the vessel by the master, the mate succeeds to the command: and it is equally clear, that, in assuming the command of the vessel *Fremlin* became the agent of the

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defendant: but, with respect to the cabin furniture and stores, he was Driver's agent.

TINDAL, C. J.—This case turns upon the question whether or not at the date of Captain Driver's letter of the 18th October, 1834, the defendant was either in actual or virtual possession of the goods which are the subject of the action; for, if he were then in possession of the goods either by himself or his agent, the language of that letter amounts to an equitable mortgage, for which there was a sufficient equitable consideration, viz. the antecedent debt due from Captain Driver to the defendant, for the payment of which the latter was pressing and the former was ready to give security. The case seems to me to fall within the principle, though not within the precise terms of *Lempriere v. Pasley*, 2 T. R. 485, where it was held that an assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, were good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. The question therefore is, in whose possession were the goods on the 18th October, 1834. It appears that, on the ship's sailing from London, they were the absolute property of Driver, the master. On her arrival in Algoa Bay, for purposes of his own, Driver leaves the ship, and the command is taken by Fremlin, the chief mate. It is said that Fremlin, in assuming the command, did so as the agent of Captain Driver. But that is not so; for, by the law maritime, where the master abandons the ship, the next in authority assumes the command of her. It is true that Captain Driver upon that occasion wrote letters of instructions to Fremlin: but, so far was Fremlin from considering himself to be acting under Captain Driver's authority, that no answer was ever returned by him to those letters: and the case states, that, on Captain Driver's leaving the ship, the com-

mand was taken by Fremlin. A letter was afterwards written by the defendant to Fremlin, confirming him in the command. It appears to me that Fremlin was as much in command of the ship as the agent of the owner before as after that communication. The defendant's letter to Fremlin, however, is material for another purpose: it shews that the defendant well knew that the property on board the vessel belonged part to himself and part to Captain Driver; for he says—"I am desirous of taking the first opportunity to advise you to retain in your own hands any property whatever, money or goods, which you have belonging to Captain Driver. I shall have a large account to settle with him, in which he will most likely be deeply in my debt: and it will be difficult for you to know what money or property belong to him and what to me as owner of the ship." It is material also to observe the conduct of the parties with regard to the property when they meet in London in October, 1834. Upon that occasion, Captain Driver writes to the defendant as follows:—"I hereby authorize and request you to keep possession of all cabin furniture and other property of mine on board the Bolton when she arrives, and to place the value of the same to the credit of my account with you." The use of the words "keep possession" seems to me to lead to the inference that Captain Driver was then aware that the defendant had the cabin furniture and other property of his in his possession. To limit it in the manner that has been suggested would I think be putting upon the letter a construction wholly different from that which the parties intended. It seems to me that the defendant was in the actual legal possession of the property by force of that agreement, and that it conferred upon him an equitable right to retain it until his debt was satisfied.—It has been urged in the course of the argument that there was nothing obligatory on the defendant; and that, in the event of a loss of the goods by fire, Captain Driver must

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have borne the loss. The same difficulty, however, presents itself in every case of pledge. In the case of cattle distrained for rent dying in the pound, the loss does not fall upon the landlord: he may make a fresh distress. For these reasons, it appears to me that the defendant is entitled to judgment.

BOSANQUET, J.—This is a very plain case. Fremlin, the mate, at the time of Captain Driver's bankruptcy, had possession of the goods in question as the agent of the defendant; and the defendant being a creditor of Driver to a large amount, Driver gives him a lien upon the goods then in his possession, to secure his debt. The substance of the case is this:—Driver became the master of the vessel under a contract with the defendant. Fremlin was appointed mate by the defendant: and, therefore, by virtue of that appointment, in case of Driver's dying or otherwise ceasing to be master, Fremlin was bound to take the command of the vessel upon himself. Arrived at Algoa Bay, Driver abandoned the command, which was assumed by Fremlin. Fremlin as agent of the owner took possession for him of the vessel and all it contained. The owner on the 30th April, 1834, addressed a letter to Fremlin, which was received by him on calling at St. Helena on the homeward voyage. By this letter, Fremlin was confirmed in the command of the vessel, and received express directions to keep whatever property might be on board, for the owner's benefit. At this time Fremlin was in possession of the ship and of every thing in her as the agent of the owner. On the 18th October, Captain Driver, at the instance of the owner, writes the letter upon which the question arises, authorizing the owner "to keep possession of all cabin furniture and other property of his on board the Bolton when she arrives, and to place the value of the same to the credit of his account with him." If that does not give the defendant a lien, I am at a loss to know how a man may

acquire a lien on property in his possession belonging to another. It has been suggested that this letter operated upon the goods only from the time of the ship's arrival in London. But the goods were already in the defendant's possession; and the authority was to *keep* possession of them. I think the letter must receive the same construction as if the words "when she arrives" had not been there.

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COLTMAN, J.—The main question is, in whose possession were the goods on the 18th October, 1834. I am not prepared to say what would have been the result of the transaction had the question arisen between Captain Driver and any other creditor than Mr. Oldfield: it might in that case be doubtful whether it could prevent the interest of the assignees from attaching; but, as between these parties, there can be no doubt, for the defendant was already in the virtual possession of the goods. If, when Captain Driver abandoned the ship in Algoa Bay, the defendant had personally possessed himself of the property, he would have had an unquestionable right to retain it. Possession was taken by Fremlin by virtue of his original authority as second in command, and as the agent of his owner. The defendant being thus in possession by his agent, the letter of the 18th October authorizes him to *keep* possession. Although the terms of that letter might admit of a prospective construction, I think they are sufficient, under the particular circumstances of this case, to convey a present right of lien.

MAULE, J.—I am of the same opinion. When Captain Driver left the ship, Fremlin took possession and assumed the command as agent of the owner. He could not without being guilty of a breach of duty accede to the terms imposed by Driver. The ship and everything on board being thus in the possession of Fremlin as agent of the

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owner, Captain Driver writes to the defendant thus:—"I hereby authorize and request you to *keep* possession of all cabin furniture and other property of mine on board the Bolton when she arrives, and to place the value of the same to the credit of my account with you." Considering the situation of the parties, the evident meaning of that is this—"You have in your possession certain property of mine; and I hereby authorize you to continue to hold it, and request you to give me credit for the value, when sold, in my account with you." At the very least that amounts to a pledge of the goods; and the defendant has a clear right to retain them as against the assignees of Driver.

Judgment for the defendant.

Friday,
 Nov. 8th.

Where a petitioning creditor's debt is compounded of debts due to two individuals, and one is found to be insufficient, the debt of another individual may be substituted for the debt so found insufficient.

The petitioning-creditors were in pleading stated to be A. and B., C. and D., and E. and F., without distinctly alleging them to constitute firms:—Held, no ground for holding the fiat void.

BYERS and Another, Assignees of CLARK, a Bankrupt,
 v. SOUTHWELL.

THIS was an action of trover brought by the plaintiffs as assignees of one John Clark a bankrupt.

The defendant pleaded, that the fiat in bankruptcy against Clark, under which he became a bankrupt as in the declaration mentioned, was issued on the 28th July, 1837, on the petition of certain persons, to wit, William Byers and Sarah Taylor Watson, John Austin and John Brunswick Austin, and Arthur Beloe and William Fisher, claiming to be creditors of the said John Clark; and that there was not before or at the time of the issuing the said fiat any debt or debts due or accruing due to William Byers and Sarah Taylor Watson, John Austin and John Brunswick Austin, and Arthur Beloe and William Fisher, from John Clark, sufficient to support the said fiat, according to the statute in force concerning bankrupts—verification.

The plaintiff replied, that, after John Clark was ad-

judged a bankrupt under the fiat in the plea mentioned, and before the commencement of this suit, to wit, on the 26th May, 1838, John Samuel and James Sloper, and also the said Sarah Taylor Watson and William Byers, and John Austin and John Brunswick Austin, having then due and owing to them from the said John Clark, and having before then proved under the fiat, debts sufficient to support the said fiat (the debt so due and owing from John Clark to John Samuel and James Sloper having been incurred not anterior to the debt of any of them the said William Byers and Sarah Taylor Watson, John Austin and John Brunswick Austin, and Arthur Beloe and William Fisher), did duly present their petition to the chief and other judges of the court of Review at Westminster, praying that it might be referred to the commissioners named in or acting under the fiat, to inquire whether the debts of the petitioners Sarah Taylor Watson and William Byers, John Austin and John Brunswick Austin, and the debt of Arthur Beloe and William Fisher, therein also mentioned, were insufficient to support the fiat, and whether the debt of the petitioners John Samuel and James Sloper was or was not incurred not anterior to the date of the petitioning creditors' debt upon which the fiat issued, which debt was formed by the debt of the firm of Arthur Beloe and William Fisher, and the debts of the petitioners Sarah Taylor Watson and William Byers, and John Austin and John Brunswick Austin; and if the commissioners should find that the debts of the petitioners Sarah Taylor Watson and William Byers, and John Austin and John Brunswick Austin, and the debt of Arthur Beloe and William Fisher, were insufficient to support the fiat, and that the debt of the petitioners John Samuel and James Sloper were incurred not anterior to the joint petitioning-creditors' debt on which the fiat issued, then that the debts of all the said petitioners might be substituted for the debts of the petitioners Sarah Taylor

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Watson and William Byers, John Austin and John Brunswick Austin, and Arthur Beloe and William Fisher: and thereupon the court of Review did afterwards, to wit, on &c., and before the commencement of this suit, find that the debt of Arthur Beloe and William Fisher, on which, with the debts of the petitioners Sarah Taylor Watson and William Byers, and John Austin and John Brunswick Austin, the adjudication of the bankruptcy of the said John Clark was made, was an insufficient debt with the debts of the last-mentioned petitioners to support the fiat issued against the bankrupt; and that the debt of the petitioners John Samuel and James Sloper proved by them under the fiat, or so much thereof as was sufficient with the debts of the petitioners Sarah Taylor Watson and William Byers, John Austin and John Brunswick Austin, to support the said fiat, was incurred not anterior to the debt of Arthur Beloe and William Fisher, and to the respective debts of the last-mentioned petitioners, and was an existing and sufficient debt with the debts of the last-mentioned petitioners to support the fiat: and thereupon the court did then, to wit, on &c., and before the commencement of this suit, order that the fiat should be proceeded in according to the form of the statute in that case made and provided; as by the record and proceedings thereof remaining in the said court more fully appeared; which order still remained in full force and effect, and not in anywise annulled or discharged—verification.

Special demurrer.

The defendant demurred specially to this replication; assigning for causes—that the replication alleged the order of the court of Review to have been awarded on the petition of creditors who petitioned for the fiat in bankruptcy, whereas the said petition on which the order of the court of Review was made ought to have been made by some creditor or creditors other than those who petitioned for the fiat—that the replication should have shewn that the debt or debts found sufficient by the court of Review were

other and different debt or debts than those on which the fiat was issued, and not part of the same debt or debts—that the replication did not allege that the whole of the debts of the petitioners to the court of Review were incurred not anterior to the debt or debts of the parties who petitioned for the fiat—that the replication should have alleged and shewn that the commissioners, in pursuance of the petition, found the petitioning-creditors' debt insufficient, and that the debts to be substituted were sufficient and incurred not anterior to the petitioning-creditors' debts—that the powers given to the court of Review by the statute did not appear to have been properly pursued—and that it should have been alleged that the order of the court of Review was under the seal of the said court, and made without prejudice to any action then pending.

The plaintiffs joined in demurrer.

Barstow, in support of the demurrer.—The 18th section of the 6 Geo. 4, c. 16, enacts, “that, if after adjudication the debt or debts of the petitioning-creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any *other* creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning-creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid.” To satisfy the words of that clause, where a petitioning-creditors' debt consisting of debts due to more than one individual or firm is found to be insufficient as to any one of the petitioners, the substituted debt must be wholly due to *other* creditors, that is, to *others than those who originally petitioned*. [*Tindal*, C. J.—If that were so, it would often be impossible to make a man a bankrupt; and we cannot come to a conclusion involving such a consequence,

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if by possibility we can come to any other. I should say that the proper construction of the clause is, that the debt to be substituted shall be a debt due to a creditor other than the creditor whose debt has been found insufficient.]

Then, it appears upon the replication that the number of petitioning-creditors is excessive. The parties who originally petitioned were, Byers, Watson, the two Austins, and Beloe & Fisher—the two latter appearing to be a firm. The debt due to Beloe & Fisher being found insufficient, Samuel and Sloper are substituted as petitioning-creditors in lieu of them: thus there appear to be *six* petitioning-creditors; for, in the absence of an averment to that effect, the court cannot assume that the amount is made up of debts due to three firms.

TINDAL, C. J.—I am of opinion that the replication is good: and that upon neither of the grounds urged can we hold the fiat void. All that the statute says with respect to the number of persons who may join in petitioning for a fiat, is, that no commission shall be issued unless the single debt of the creditor or of two or more persons being partners petitioning for the same shall amount to 100*l.* or upwards, or unless the debt of two creditors so petitioning shall amount to 150*l.* or upwards, or unless the debt of three or more creditors so petitioning shall amount to 200*l.* or upwards. The precise nature of the debt need not appear, as the argument would seem to require, upon the fiat. We must accredit the act of the Great Seal. The defendant might have taken issue upon the sufficiency of the debt.

The rest of the court concurring—

Judgment for the plaintiff (55).

(55) See *Ex parte Hunter*, 2 Deac. & Chitt. 507.

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BEESLEY v. DOLLEY.

THIS was an action of debt. The declaration stated that the defendant was, on the 1st February, 1837, indebted to the plaintiff in 40*l.* for the hire of horses, 40*l.* for the hire of carriages, and 40*l.* for money found due upon an account stated, whereby an action had accrued to the plaintiff to demand and have of and from the defendant 120*l.*—breach, non-payment.

The defendant pleaded, as to all the demands except 16*l.* 8*s.*, that, after the making of the several supposed contracts in the declaration mentioned, except as aforesaid, and before the commencement of the suit, to wit, on the 12th October, 1827, and on divers other days and times between that day and a certain other day, to wit, the 1st April, 1828, the defendant paid the plaintiff divers sums of money, amounting in the whole to all the monies in the declaration mentioned, except as aforesaid, in full satisfaction and discharge of all those monies, except as aforesaid, and of all damages sustained by the plaintiff by reason of the detention thereof; and the plaintiff then accepted and received the same of and from the defendant in full satisfaction and discharge accordingly: and, as to the 16*l.* 8*s.*, a set-off.

Special demurrer, assigning for causes—that it did not appear by the said plea in respect of which counts or causes of action in the declaration contained the payments in the plea mentioned were made; and it was altogether uncertain which of the debts, contracts, and causes of action the defendant alleged to be paid and satisfied, and which he admitted to be due and unsatisfied—and that it appeared by the plea that the payments in the plea mentioned were made long before the debts in the declaration mentioned were stated to have been due, and therefore

The plaintiff declared, that, on the 1st February, 1837, the defendant was indebted to him in 40*l.* for the hire of horses, 40*l.* for the hire of carriages, and 40*l.* upon an account stated; the defendant pleaded, as to all the demands except 16*l.* 8*s.*, that, after the making of the several contracts in the declaration mentioned, to wit, on the 12th October, 1827, he paid the defendant divers sums of money amounting in the whole to all the monies in the declaration mentioned, except as aforesaid, and the plaintiff accepted and received the same in full satisfaction:—Held, that the plea was good in form, though pleaded thus generally, and the particular date of the payments was alleged (under a viz.) to have been before the day laid in the declaration.

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such payments could not have been made in satisfaction of the debts in the declaration mentioned. Joinder.

Talfourd, Serjeant, for the defendant, stated that the demurrer was founded upon the case of *Mee v. Tomlinson*, 5 N. & M. 624, where the plaintiff declaring, first for work and labour, secondly for money paid, and thirdly for money due upon an account stated, a plea alleging that 20*l.* parcel of the sum mentioned in the third count, and 20*l.* parcel of the several sums demanded in the first and second counts, were one and the same debt of 20*l.*, and not distinct debts of 20*l.*, was held bad, on special demurrer, for not shewing how much of the 20*l.* admitted to be due on the first two counts, was admitted to be so due on each of those two counts separately; but that case had since been over-ruled in *Jourdain v. Johnson*, 2 C. M. & R. 564, 4 Dowl. 534; *Marshall v. Whiteside*, 1 M. & Welsby, 188, 4 Dowl. 766; *Lorymer v. Vizeu*, 4 Scott, 190, 3 New Cases, 222; and *Noel v. Davis*, 7 Dowl. 48.

F. Kelly, contra, relied upon the other ground of demurrer assigned, viz. that the plaintiff having in his declaration given the date of the accruing of the debt, and the defendant having pleaded payments made between two given dates, the last of which was anterior to the date of the accruing of the debt, the plea made the record inconsistent: and he referred to *King v. Roxbrough*, 2 Tyr. 468, where Bayley, B., said: "Time and place must be laid in pleading every material fact. It was essential to lay a date to the allegation that the defendant was indebted to the plaintiff; and it would not have been sufficient to state merely that the defendant on a certain day promised to pay."

PER CURIAM.—The times of the supposed payments are

stated under a *videlicet*, and they are alleged to have been made after the making of the contracts in the declaration mentioned. The plea is therefore sufficient. The plaintiff may, however, on payment of costs, withdraw the demurrer, and reply *de novo*.

Rule accordingly.

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HILL v. WHITE, WILLIAMS, and BOULTER.

UPON a reference of this cause by order of *Nisi Prius*, the arbitrator awarded that the verdict which was then entered for the plaintiff should be set aside, and a verdict be entered for the defendants in lieu thereof; but stated the following facts for the opinion of the court:—

The declaration was in *assumpsit*, the first count being for work and labour as an attorney, the second for money paid to the defendants' use, the third on an account stated. The defendants pleaded in abatement, to the whole declaration, that the promises were made by them jointly with one Mary Ann Griffiths; which was traversed by the replication.

By his particular of demand the plaintiff claimed 35*l.* 14*s.* 8*d.* for business done by the plaintiff as the attorney and solicitor of the defendants. He gave in evidence an account amounting to that sum, which was divisible into four parts: the first was chargeable to the defendant Boulter alone; the second, which amounted to the sum of 4*l.*, was chargeable to all the defendants and M. A. Griffiths jointly, as in the plea alleged; the third was chargeable to the defendants White and Boulter and M. A. Griffiths jointly, but not to the defendant Williams; the fourth was chargeable to White and Williams jointly, and not to the defendant Boulter. The work was proved to have been done: and the plaintiff insisted, that, as the plea did not apply to the whole sum claimed in the parti-

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In an action against three defendants for work and labour, for money paid, and for money due upon an account stated, the defendants pleaded in abatement, to the whole declaration, that the promises were made by them jointly with one M. A. G. It appeared that the plaintiff had no cause of action against the three defendants jointly, but a demand to a small amount against one, another demand against the three jointly with M. A. G., another against two of the defendants jointly with M. A. G., and another against two of the defendants only:—Held, that the defendants were entitled to judgment.

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culars, and there was no defence on the record to meet the sum not covered by that plea, he was entitled to nominal damages.

If the court should be of that opinion, the verdict which was then entered for the plaintiff was to stand, but the damages were to be reduced to the sum of one shilling.

Butt, for the plaintiff.—The plea is clearly bad; it is pleaded to the whole of the plaintiff's demand, and applies only to 4*l.* of it, leaving the plaintiff as to the rest unanswered. The defendants should have pleaded in bar as to part and in abatement as to the residue. Upon the record as it now stands, the plaintiff is at all events entitled to nominal damages: it is a judgment by default as to so much of the demand as the plea is inapplicable to. The case is not to be distinguished from *Godson v. Good*, 6 Taunt. 587, where it was held that a plea in abatement that the defendant jointly with sixteen others contracted, imports that the defendant jointly with sixteen others, *and no more*, contracted; and if there were more joint contractors than the sixteen, the plea is disproved. Taking the declaration in conjunction with the particulars, it may be read as a count for 35*l.* 14*s.* 8*d.* for work and labour; with a plea in abatement of a matter which is applicable only to a part of the demand. In 2 Wms. Saund. 210 *a*, n., it is said: "A writ is divisible, and may be abated in part, and remain good as to the residue; and therefore the defendant may plead in abatement to part, and demur or plead in bar to the residue of the writ; the settled rule upon this head being, that, if the plaintiff in his action brought either upon a general writ, such as debt, detinue, account, or the like, or on a certain or particular one, as assumpsit, trespass, case, &c., demands two things, and it appears by his own shewing that he cannot have an action or better writ for one of them, the writ shall not abate in

the whole, but stand for so much as is good; but, if it appears that he has a cause of action for both the things demanded, but the writ is not the proper writ for one of them, but he may have another for it in another form, the whole writ shall abate." In form the present is a plea in abatement of the whole writ, shewing upon the face of it ground of abatement only as to part: and the case is well illustrated by *Herries v. Jamieson*, 5 T. R. 553: there, on a writ in debt for 1066*l.*, the plaintiff declared for 1000*l.* borrowed by the defendant of the plaintiff, and in a second count for 66*l.* for interest of money lent by the plaintiff to the defendant; the defendant pleaded in abatement of the writ, "that the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from the plaintiff," was borrowed by the defendant and others, and not by the defendant separately: on demurrer, because this plea answered only one of the causes of action (that mentioned in the first count), the court held the plea bad. And in *Powell v. Fullerton*, 2 B. & P. 420, it was held, that, if a plea in abatement contain matter which goes in part abatement of the writ only, but conclude with a prayer that the whole writ may be abated, the court may abate so much of the writ as the matter pleaded applies to.

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Gray, contra, was stopped by the Court.

TINDAL, C. J.—It appears to me that this case is free from doubt. The plaintiff sues the three defendants for work and labour; and in that action it is clear that he cannot recover except in respect of a debt due from the three. The defendants meet the plaintiff's case by a plea in abatement, that the contract upon which the plaintiff is proceeding was entered into by the three defendants jointly with another person, and not otherwise: and it turns out when the parties come before the arbitrator that there is nothing due from the three defendants only, but a small

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portion of the sum claimed is due from the three jointly with that other person; therefore the plea is made out in terms. I do not see that the case is at all varied by the bill of particulars: if it is, it is only to make it stronger against the plaintiff. The authorities cited do not help the plaintiff. In *Herries v. Jamieson*, the plea was addressed to one count only; the other was left unanswered: and in *Godson v. Good*, the plea was altogether false. Here, however, it is true, as alleged in the plea, that the only cause of action the plaintiff had was in respect of a contract made, not with the three defendants only, but with the three defendants jointly with another person; and therefore the defendants are entitled to the verdict.

BOSANQUET, J.—I am of the same opinion. The plea admits a contract, but alleges that it was made by the three defendants jointly with a fourth. If a contract by the four were proved to any amount, and it were not shewn that the plaintiff had any cause of action referable to the three only, then the plea was proved.

COLTMAN, J.—I cannot comprehend the difficulty suggested. It may sometimes be necessary to plead in abatement as to part, and in bar as to the residue: as, if in the present case the plaintiff had been suing in respect of one debt due from the three defendants jointly, and another debt due from the three defendants jointly with Mrs. Griffiths, then it would have been necessary to plead in abatement as to part and in bar as to the residue. But here the plaintiff sues only in respect of one contract entered into by the three defendants. To this he was confined by his bill of particulars, out of which he had no right to travel. The award is right.

MAULE, J., was absent.

Judgment for the defendants.

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UPON a reference of this cause by order of Nisi Prius, the arbitrator ordered that the verdict which had been entered for the plaintiff should stand, but that the damages should be reduced to the sum of 5*l.*, subject to the opinion of the court upon the following facts:—

The declaration was in assumpsit, and contained three counts—the first for work and labour as an attorney, the second for money paid to the use of the defendants at their request, and the third upon an account stated. The defendants pleaded in abatement, that the promises in the declaration were made by the defendants jointly with Benjamin Boulter, John Boulter, William Standy, Josiah Griffiths, Hannah Griffiths now the wife of William Robinson, Susannah Griffiths, Samuel Henry Turner, Mary Ann Griffiths, and John Griffiths; which plea was traversed in the replication.

The plaintiff in his particular of demand claimed 98*l.* 2*s.* 8*d.*, the balance of an account for business done by the plaintiff as the attorney of the defendants. He proved that he had done business for the two defendants jointly. There was no account which shewed any balance of 98*l.* 2*s.* 8*d.*; but the plaintiff produced two bills, which were divisible into three parts—one, to the amount of 5*l.*, was for business done for the defendants in and about the trusts of the will of one Mary Griffiths, of whom the defendants were executors—the second, to the amount of 36*l.* 5*s.*, was for business done in the course of a suit instituted in the court of Chancery against the defendants and other parties, in compromising the same and in carrying that compromise into effect, for which business the defendants jointly with the different persons stated in the plea were liable; the plaintiff had received the sum of 80*l.*, which he had applied, and properly applied, in part liqui-

To assumpsit for work and labour, &c., the defendants pleaded that the promises in the declaration mentioned were made by them jointly with nine others, naming them. The evidence was, that work to the amount of 5*l.* was done for the defendants alone, and that a balance of 6*l.* 5*s.* was due for work done for the defendants and the other persons named in the plea:—Held, that the evidence did not sustain the plea, and that the plaintiff was entitled to a verdict for 11*l.* 5*s.*

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dation of the above sum—the third was a claim made by the plaintiff upon the defendants for the costs of taxing a bill of costs of France, the former attorney of the defendants, to the amount of 14*l.* 10*s.* 1*d.*; but France had paid to the plaintiff the sum of 9*l.* for the costs of that taxation, which sum was a full compensation for the services rendered to the defendants by the plaintiff on that account. The plaintiff also proved that he had paid 4*l.* 13*s.* 4*d.* for the defendants, but without any authority from them for so doing. He gave no evidence of any account stated.

The defendants contended, that, as the plea in abatement was proved as to one part of the plaintiff's claim, they were entitled to the verdict: while the plaintiff contended that, as the plea failed as to part, it failed altogether; or at least that it was divisible, and that the plaintiff was entitled to recover as to that part to which the plea in abatement was not applicable.

If the court should be of opinion that the defendants were right, the verdict was to be set aside, and entered for them. If they should determine that the plea wholly failed, then the verdict to be entered for the plaintiff, damages 11*l.* 5*s.* If, however, the plea were divisible, then the verdict was to stand for 5*l.*

Gray, for the defendants (56).—The effect of the finding is, that, at the time the action was brought, a sum of 5*l.* was due from the defendants to the plaintiff, and a further sum of 6*l.* 5*s.* from the defendants and the other parties named in the plea. Both these demands were for work and labour, and there was only one count for work and labour in the declaration. Upon a count in *indebitatus assumpsit* against one, the plaintiff cannot recover a separate debt due from the defendant alone, and also a debt due from him jointly with a co-contractor who is living, though he

(56) The defendants were allowed to begin, as they impeached the award.

may if the co-contractor be dead—*Richards v. Heather*, 1 B. & Ald. 29; *Slipper v. Stidstone*, 5 T. R. 493; *French v. Andrade*, 6 T. R. 582. Every count must be confined to a single contract. [*Bosanquet, J.*—If goods be purchased by A. alone, and other goods by A. and B. jointly, in the absence of a plea in abatement, the seller might recover against A. in respect of both.] The sale might be a good consideration for an express promise by A. to pay for both: but here the plaintiff seeks to recover in respect of two separate implied contracts upon the same count. Here, if the defendants had pleaded to the separate debt, what would there be to prevent the plaintiff from saying that he brought his action in respect of the joint debt? and thus the defendants would be deprived of their plea in abatement. Suppose, on the other hand, the defendant assumes that the action is brought for the joint debt, and pleads (as he has done here) in abatement: the plaintiff might now assign the separate debt, and thus would receive no prejudice. [*Maule, J.*—Is there any authority to shew that a plaintiff may now assign after a plea in abatement?] There is a precedent in 3 Chitty on Pleading, 6th edit. 1187 (57). The right to now assign is not confined to trespass—*Greenhow v. Isley*, Willes, 619; *Chambers v. Jones*, 11 East, 406; *Lord Bagot v. Williams*, 3 B. & C. 235, 5 D. & R. 87; *Heydon v. Thompson*, 1 Ad. & E. 210, 3 N. & M. 319. [*Tindal, C. J.*—The plaintiff

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(57) "And the plaintiff says that he issued his said writ and declared thereon, not for the non-performance of the promises mentioned in the said plea, and therein alleged to have been made by the defendant and the said E. F. jointly, but for the non-performance by the defendant of other and different promises made by the defendant alone to the plaintiff, to wit, the promises in the said declaration mentioned, made

as therein alleged, and which were and are other and different promises to the promises in the said plea mentioned and therein alleged to have been made by the defendant and the said E. F. jointly: and this the defendant is ready to verify; wherefore he prays judgment and his damages by reason of the non-performance of the said promises above newly assigned to be adjudged to him &c."

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has a very good writ up to a certain extent: the plea goes to the *whole*.] The defendants could not plead in abatement as to part and in bar as to the residue. [*Tindal*, C. J.—You may plead in abatement to one of several counts—2 *Lutw.*, Appendix, 1592: and, if counts are divisible, you surely ought not to plead in abatement to the whole (58).] In *Colson v. Selby*, 1 Esp. 452, which was an action of assumpsit for goods sold and delivered, the plaintiffs claimed by their particulars 1699*l.* 13*s.* 6*d.*, of which 1557*l.* 1*s.* 5*d.* was admitted to be due for goods supplied to the defendant and one Towns, his partner. The defendant having pleaded the partnership in abatement, it was contended for the plaintiffs that they were entitled to recover in respect of the goods that were supplied on the credit of the defendant alone. But Lord Kenyon ruled “that the plaintiffs were bound by the particular they had given in; and one of the articles being clearly on the partnership account, the defendant was well warranted in the plea he had pleaded.” The plaintiff was thereupon nonsuited; and the court refused to set aside the nonsuit. In *Freeman v. Crafts*, 4 M. & Welsby, 4, and *James v. Lingham*, 5 New Cases, 553, 7 Scott, 603, where a new assignment was held not to be necessary, the pleas in effect attempted to elude the real cause of action.

Butt, *contra*.—No authority has been or can be cited to shew that there may be a new assignment after a plea in abatement: it would clearly be bad. The proper course for the defendants to adopt was, to plead in abatement as to part of the demand, and non assumpsit or any other plea in bar to the residue. That there may be a plea in abatement to part of a declaration is clear—2 Wms. Saund. 210 *a*, et seq., in notis; Stephen on Pleading, 271; *Herries v. Jamieson*, 5 T. R. 553: and there can be no rea-

son in principle why such a plea may not apply itself to a part of a count. There is no difference in this respect between several counts and several contracts in the same count: nor is there any such distinction as suggested between express and implied contracts, for, in pleading, all contracts are express. The circumstance of a joint-contractor being living makes no difference unless advantage be taken of it by a plea in abatement. In *Richards v. Heather*, 1 B. & Ald. 33, Lord Ellenborough says: "It would be more convenient in all cases, where a debt accrues from the defendant as surviving partner, to declare against him accordingly, because it is convenient to make the forms of declaration subservient to the information of the party charged; but it is not essentially necessary to the maintenance of the action, for, where there are several partners who are living, one of them may be declared against as the sole debtor, and the only objection to this mode of declaring is, that the plaintiff is liable to be turned round by a plea in abatement. But, inasmuch as where the other partner is dead there cannot be any plea in abatement, cessante ratione cessat lex. The reason which requires that the demand shall be stated as a joint demand ceases when the plea in abatement can be no longer pleaded." *Colson v. Selby* does not touch the point. The real question is whether or not the plea gives the plaintiff a better writ: and this it clearly does not.

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Gray, in reply.—*Colson v. Selby* is precisely in point, and its authority has never been shaken.

TINDAL, C. J.—This is an action of assumpsit for work and labour as an attorney against two defendants. The defendants pleaded in abatement to the whole writ and declaration, that the promises in the declaration mentioned were made by them jointly with nine others; upon which issue was joined. The cause was referred, and the arbitrator

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has found specially, that the defendants were indebted to the plaintiff in the sum of 5*l.* for business done for them in and about the trusts of the will of one Mary Griffiths, of whom the defendants were executors; and that the plaintiff had a claim to the amount of 36*l.* 5*s.* against the defendants and the other parties mentioned in the plea, on account of which 30*l.* had been paid: and the question is, whether, when it is found that all the contracts were not made with the defendants jointly with the other parties, but one of them with the defendants alone, the latter can be said to have succeeded in establishing their plea. It seems to me that they cannot. There is no doubt a defendant may plead in abatement to one of several counts; and there seems to me to be no reason why, where there are several causes of action combined in one count, the plea may not be confined to one or more of them; in other words, why a defendant may not plead as to so much of the count in abatement, and as to the rest any plea in bar. For this, the case in *Lutwyche* (App. 1592) seems to be an authority. Instead of adopting that course in the present case, the defendants have pleaded in abatement to the whole of the plaintiff's demand a plea which is false in fact. Why should the plaintiff be injured by the generality of the plea? The case seems to me to be analogous to that of a plea of leave and licence in trespass, as in *Barnes v. Hunt*, 11 East, 451, where, to a declaration for several trespasses on the plaintiff's land on divers days &c., the plea alleged, that, at the said several days &c., the defendant committed the said several trespasses by licence of the plaintiff; and the latter replied that the defendant of his own wrong, and *without the cause* alleged, committed the said several trespasses &c.: and it was held that evidence of a licence which covered some but not all of the trespasses proved within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication. It was contended that the *cause* only, namely the licence, which went to the whole trespass, was

put in issue by the replication ; and that, there being no new assignment, and proof having been given of trespasses which were covered by the licence, the defendant was entitled to a verdict. Bayley, J., said : "The declaration is general, complaining of trespasses on divers days within a certain period. The defendant undertakes to meet that general and indefinite charge, and says, in effect, that, whatever may be the number of trespasses that the plaintiff complains of within that period, he is prepared to shew as many licences. The replication states that the defendant at the said several days committed the said several trespasses of his own wrong, and without the cause alleged. What does that put in issue but that the defendant had a licence to cover all those trespasses? Then, in common sense and understanding, we must take it that *the cause* put in issue by the replication is, that the defendant had not a licence co-extensive with the trespasses complained of : and a new assignment could have done no more than repeat the same thing." So here, I see no reason for saying that a new assignment was necessary : the plaintiff had a right to stand upon the falsehood of the defendants' plea : and no *authority* has been adduced to shew that there can be a new assignment after a plea in abatement. With respect to *Colson v. Selby*, I am ready to admit that it is difficult to reconcile it with our present decision. But I am not prepared to subscribe to the doctrine of that case : it is only a *Nisi Prius* case, and it certainly underwent not much discussion. Here the defendants have pleaded a plea which is false in fact, and the issue on which has been found against them. I therefore think the plaintiff is entitled to a verdict for 11*l.* 5*s.*

BOSANQUET, J.—I am also of opinion that the plaintiff is entitled to recover to the extent of 11*l.* 5*s.* The plaintiff declares for work and labour, and claims by his particulars a sum of 98*l.* 2*s.* 8*d.* as the balance of an account

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for business done as the attorney of the defendants; the proof was confined to two sums, one of 5*l.* for business done for the two defendants, the other of 36*l.* 5*s.* for business done for the defendants and others, 30*l.* of which had been paid on account. The defendants were at liberty, consistently with the authorities, to plead in abatement as to part of the demand, and any plea in bar to the rest. The whole demand was due to the plaintiff, though part only was due from the two defendants. They plead *to the whole*, that the promises in the declaration mentioned were made by them jointly with nine others. The plea not being proved, it follows that the plaintiff is entitled to a verdict. It is to be observed that this plea gives no better writ for the separate debt of the two defendants. *Colson v. Selby* certainly bears very strongly upon the present case: it, however, underwent very little discussion, and my judgment does not go with it.

MAULE, J.—The plaintiff in his declaration alleges that the defendants are indebted to him in a certain sum for work and labour. The defendants, admitting the debt, plead that other persons are jointly liable with them; and the arbitrator finds that part of the work was done for the defendants, and other part for the defendants and the other persons. The question is, in what way is the issue to be determined, and to what damages is the plaintiff entitled. The defendants having failed to prove that the *whole* of the plaintiff's demand was due from them jointly with the other parties named in their plea, have failed to sustain the plea. The plaintiff is therefore entitled to a verdict for the sum proved due—11*l.* 5*s.* . If the terms of the report of *Colson v. Selby* be taken literally, that case certainly is at variance with our present decision. . But I cannot help thinking that, if the facts had been more fully stated, it would have been found not inconsistent with it.

Judgment accordingly.

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Friday,
Nov. 8th.

FRANCE and HILL v. WHITE and WILLIAMS.

UPON a reference of this cause by order of Nisi Prius, the arbitrator directed that the verdict, which was entered generally for the plaintiffs, should be set aside, and a verdict be entered for the defendants on all the issues, subject to the opinion of the court upon the following facts:—

The declaration contained three counts in assumpsit—the first for 200*l.* for work and labour of the plaintiffs as attorneys for the defendants—the second for 200*l.* for money paid by the plaintiffs to the defendants' use—the third for money due on an account stated. The defendants pleaded—first, except as to 27*l.* 19*s.* 3*d.*, that they never promised—secondly, payment—thirdly, a set-off for money had and received by the plaintiffs to the defendants' use, and on an account stated. In the replication the last two pleas were traversed.

F. and H., attorneys, sued the defendants for work and labour; the defendants pleaded a set-off for money received by F. before H. became a member of the firm:—Held, that the plea was no answer to the action, notwithstanding F. had after the commencement of the partnership admitted the receipt of the money.

For some time previous to July, 1831, the plaintiff France was carrying on business as an attorney and solicitor at Worcester, the plaintiff Hill being his clerk and the son of a former partner. In July, 1831, the two plaintiffs entered into partnership, and continued in partnership until November, 1833. The defendants were the executors of one Mary Griffiths, and had employed the plaintiff France as their attorney in the management of the estate up to the time of the partnership, and continued to employ him after the partnership, of which no notice was given to them. Both the plaintiffs were personally engaged in the business of the defendants. Various sums of money belonging to the estate had come into the hands of France, but all prior to the partnership. In April, 1832, there was a meeting of the executors and the parties interested in the estate at the office of the plaintiffs, when a statement of the executors' accounts with the estate was made out by the clerk of the plaintiffs, by which it appeared that there

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was a certain balance due to the different legatees. At that meeting Hill was not present; but the plaintiff France stated that a sum of 15*l.* was to be retained by the executors to meet any further bill on account of France & Hill, which item, as well as another, for the payment of additional duties, was entered at the foot of the account before the final balance was struck. Those sums, and more, were then in France's hands. Of the state of the accounts between France and Hill the arbitrator had no knowledge. Additional probate and legacy duties were afterwards paid by the plaintiffs; and business was done by them on behalf of the defendants, for which the present action was brought: but the whole amount of their bill was fully covered by the amount of the monies belonging to the estate so received by the plaintiff France, and never paid over to the executors.

It was objected, on the part of the plaintiffs, that the defendants could not set off any monies received by France alone against the debt incurred by them with the partnership; and that the declaration by France, referring as it did to the receipt of money previously to the partnership, could not bind Hill, and therefore could not be treated as any admission by the plaintiffs of money in their hands belonging to the defendants.

If the court should be of opinion that these facts supported the plea of payment or set-off, both or either of them, the arbitrator ordered that the verdict thereon should be entered for the defendants accordingly; otherwise it should stand for the plaintiffs.

Butt, for the plaintiffs.—The plaintiffs are entitled to a verdict. The money received by France before the partnership of France & Hill constituted a separate debt as between him and the executors, and cannot be made the subject of a set-off against a debt due to the firm—*Williams v. Noble*, 3 Mer. 618; *Jones v. Fleming*, 7 B. & C. 217:

unless by agreement, which should be pleaded—*Kinnerley v. Hossack*, 2 Taunt. 170. Nothing occurred at the meeting in April, 1832, to affect Hill, or in any degree to alter the liabilities of the parties.

Gray, for the defendants.—The question is, whether, if the facts that appear upon this award had been proved before a jury, and they had found a verdict for the defendants, such verdict could have been sustained. Undoubtedly a joint debt cannot in general be set off at law against a separate debt, or a separate against a joint debt. But here the mode of dealing between the parties has converted that into a joint debt which might have been a separate debt. The defendants might reasonably conceive, from the circumstance of the business always having been carried on in the name of France & Hill, that they were employing the two. They had no notice of any change in the firm. This is in effect an attempt to defeat the defendants' set-off, by joining a dormant partner.

Butt, in reply.—There is nothing upon the face of the award to change the legal rights of the parties. There is nothing to shew that the plaintiffs are asserting a secret partnership: the award merely states that no *notice* of the partnership was given to the defendants; but it is clear they were aware of it. If France had been sued alone for the money, as for money received by him to the use of the defendants, he could not have set off the partnership bill: it follows, therefore, that the present set-off cannot be sustained.

TINDAL, C. J.—I certainly have felt much anxiety to discover some ground upon which this award might be supported: but, upon the best consideration I can give to the case, I think the objection must prevail. The action is brought for work and labour by the two plaintiffs as attor-

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nies, for money paid to the defendants' use, and for money found due upon an account stated. The defendants pleaded non assumpsit, except as to 27*l.* 19*s.* 3*d.*, payment, and a set-off for money had and received by the plaintiffs to the defendants' use. When the parties came to trial, it was agreed that *the cause* should be referred. We must, therefore, see whether or not, upon the evidence that was before him, the arbitrator has come to a right conclusion. It appears to me that the difficulty suggested on the part of the plaintiffs cannot be got over. There is no evidence of any joint debt due from France & Hill to the defendants. Possibly the defendants might have availed themselves of the set-off by a special plea: the plaintiffs could not have been permitted to assert a dormant partnership in order to evade the defendants' set-off. But the record is not so framed as to meet the difficulty. At no time could the defendants have maintained a joint action against France & Hill for money had and received: and, if they had sued France alone, he could not have set off the debt due to the firm.—Then, as to the plea of payment—the alleged payment took place before the accruing of the cause of action in respect of which the plaintiffs sue: if there had been an agreement between the parties that the money received by France should go towards satisfaction of the partnership demand, it should have been pleaded specially, and could not be given in evidence under a general plea of payment. Although I should have been extremely glad to have been able to do substantial justice, I cannot say that either of the pleas is made out, and therefore the plaintiffs must have judgment.

BOSANQUET, J.—The question is, whether either of the pleas of payment or set-off is supported by the facts found by the arbitrator. In order to sustain the plea of payment, it must appear that the money came to the hands of the plaintiffs: a previous agreement that money in the

hands of one of them should be applied in satisfaction of the joint claim does not satisfy the plea, though such an agreement might be the subject of a special plea. I cannot see how Hill could be bound by the declaration of France. With respect to the plea of set-off—it is admitted that the money which the defendants claim a right to set off came to the hands of France before the partnership. Upon such a state of facts, the defendants could not have sued the firm for the money so received: that plea therefore cannot be supported.

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COLTMAN, J.—I am of the same opinion. This would be the ordinary case of debts due in different rights, unless varied by that which took place with France at the meeting of the executors and legatees in April, 1832. But that meeting had no reference to outstanding claims between the executors and the present plaintiffs.

ERSKINE, J., was absent.

Judgment for the plaintiffs.

EDMAN v. ALLEN.

THIS was an action of assumpsit upon an agreement by the defendant to let to the plaintiff a messuage in Northampton for one year from the 25th March, 1838; the plaintiff to take the fixtures at a valuation *in the usual way*, and to pay for the same on entry. The declaration contained an averment of the plaintiff's readiness to fulfil the agreement and to take the fixtures at a valuation in the usual way, and pay for the same: breach; that the defendant would not let the plaintiff into possession.

Tuesday,
Nov. 5th.

In an action for the breach of an agreement to let a house to the plaintiff for one year from the 25th March, the plaintiff to take the fixtures at a valuation, and to pay for the same on entry:—Held, that the plaintiff was not precluded from giving evidence of a

tender of the price of the fixtures and demand of possession at a day subsequent to the 25th March.

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The defendant pleaded—first, *non assumpsit*—secondly, that the usual way of ascertaining the value of fixtures in Northamptonshire, in the case of an incoming tenant, is, for the lessor to appoint a person to value on *his* behalf, and the incoming tenant to appoint another person to value on *his* behalf; the two appraisers to meet on the premises, and jointly ascertain the value of the fixtures, and, if they cannot agree, to nominate a third person; the valuation to be completed before the time when, by the terms of the demise, the tenant is to have possession of the premises: that the defendant gave notice to the plaintiff that the defendant had appointed J. S. to be his valuer, and that J. S. would attend on the premises to meet the plaintiff's valuer on the 19th March, 1838: that J. S. attended, but that the plaintiff did not, on the 19th March or on any day before or upon the 25th March, cause any valuer to attend on his behalf or any valuation to be made, in consequence of which no valuation could be made or was made, and the defendant refused to allow the plaintiff to take possession.

To the second plea the plaintiff replied *de injuriâ*.

The cause was tried before Bosanquet, J., at the Summer Assizes at Northampton in 1838. On the part of the defendant it was proved that his valuer attended on the premises on the 19th March for the purpose of making a valuation. For the plaintiff, evidence was given to shew that the valuation by his valuer was prevented by the fraud of the defendant. Evidence was also offered (and, though objected to, received,) on the part of the plaintiff, that he had on the 6th April tendered a sum of 10*l.* as the value of the fixtures, and demanded possession of the premises.

The learned judge read over the second plea to the jury, and intimated to them an opinion that the plea was not established, and that the defendant's motive was not in issue.

The jury returned a verdict for the plaintiff on both issues, damages 12*l.* 10*s.*

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Adams, Serjeant, in Michaelmas Term, 1838, obtained a rule nisi for a new trial, on the ground that evidence of fraud was not admissible, not having been replied; and that that which took place after the 25th March, merely tending to shew a readiness on the part of the plaintiff to perform, or an excuse for the non-performance of the contract at the proper time, was not put in issue by the replication.

Goulburn, Serjeant, and *Hildyard*, now shewed cause.—By the replication, all the facts stated in the second plea were put in issue. The evidence of the tender and demand of possession on the 6th April was clearly admissible: for, though by the terms of the agreement the plaintiff would be bound to pay rent from the 25th March, he was not bound to enter on that day, and the payment for the fixtures was to be made *on entering*. *Carpenter v. Blandford*, 3 M. & R. 93, 8 B. & C. 575, is very nearly in point: there, upon a sale of an interest in a house, the fixtures to be taken at a valuation, and deposit forfeited if the purchase should through the default of the purchaser not be completed on a certain day; the vendor's agent having been informed on that day that the purchase would not be completed until the following day, and no objection having been made; it was held that the vendor could not on the second day insist upon the forfeiture.

Adams, Serjeant, and *N. R. Clarke*, in support of the rule.—The court will grant a new trial if *any* evidence was received that ought to have been rejected: and that which happened after the 25th March was clearly irrelevant, and only calculated to excite a prejudice. The second plea is

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in substance a denial of the performance of that which is a dependent covenant. The plaintiff should have replied a dispensation.

TINDAL, C. J.—The only point for consideration is whether or not evidence was received which upon the state of the pleadings was by law inadmissible. The evidence objected to was that of a demand of possession and a tender of 10*l.* on the 6th April; and the ground of objection is, that evidence ought not to have been received of any thing which took place after the 25th March. I agree, that, if by the terms of the memorandum the plaintiff was to enter on the 25th March, and the valuation to take place *before*, a tender and refusal *after* that day would not form a ground of action. But here is no stipulation that the plaintiff shall enter on the 25th March: the agreement is that the plaintiff shall take the house for one year from the 25th March, and shall take the fixtures at a valuation in the usual way, and pay for the same on entry; that is, he must cause a valuation to be made and pay the amount when he enters. The evidence objected to was of a continuing refusal to permit the plaintiff to enter, and was I think admissible, as tending to throw a light upon the previous transaction. Whether the issue was properly found or not, is immaterial, the verdict being under 20*l.* The rule must be discharged.

BOSANQUET, J.—I am of the same opinion. We must take it that the second plea was properly negatived by the jury. The only question is whether or not the evidence of the tender of the 10*l.* and the demand of possession on the 6th April was admissible. It appears to me that it was. Though bound to pay for the fixtures before he entered, the plaintiff was not bound to enter on the 25th March.

COLTMAN, J.—The case is not unattended with difficulty. The replication puts the whole of the plea in issue: and the material part of the plea is, that, by the custom of the country, the valuation should be completed before the time when by the terms of the demise the tenant was to have possession of the premises, and that the plaintiff did not on any day before or on the 25th March cause any valuer to attend on his behalf, or any valuation to be made. We are not called upon to consider whether the plea is a good answer to the declaration or not; but whether the evidence tendered was relevant to the issue. Now, the evidence that was objected to was offered for the purpose of proving an allegation in the declaration that was not put in issue by the plea. And, though the objection would seem to be a frivolous one, I must confess I think it ought to prevail, the evidence being offered not for a purpose that was legitimate and relevant, but rather for the purpose of creating a prejudice and enhancing the damages.

ERSKINE, J.—I am of opinion that the rule obtained in this case should be discharged. We are not called upon to consider whether or not the jury have given proper effect to the evidence, but merely whether it was admissible. The action is brought by a lessee against the lessor for refusing to permit him to enter upon the occupation of the premises demised pursuant to the agreement. The defendant justifies his refusal to allow the plaintiff to enter, by alleging a custom for the valuation and payment of the price of the fixtures to precede the taking possession and commencement of the term. Every allegation in the plea is put in issue by the replication. A witness was called to prove a tender of 10*l.* and demand of possession on the 6th April. The sum tendered might have been the amount of the valuation. I do not see upon what principle the learned judge could have refused to receive that

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evidence. And I agree with my Lord Chief Justice and my Brother Bosanquet that there is nothing in the agreement to tie the parties down to the 25th March.

Rule discharged.

Monday,
Nov. 25th.

An order of reference having been rendered abortive in consequence of obstacles wilfully presented by the plaintiffs, trustees, and their cestui que trust, the court, at the instance of the plaintiffs, directed a new trial, but ordered that they should pay the defendants all the costs that they had by their conduct uselessly entailed upon them.

MORGAN and Another v. MILLER and Another.

THIS was an action upon a bond in the penal sum of 10,000*l.*, given by the defendants to the plaintiffs to secure the payment of 5,000*l.*, by instalments, with interest. The bond was given to the plaintiffs as trustees for the benefit of the widow and infant children of one Whitton, under the provisions of a settlement made on the subsequent marriage of his widow with one Farden.

Upon the cause coming on for trial before Tindal, C. J., at the sittings at Guildhall after Hilary Term, 1836, an order was made by consent to refer the cause and all matters in difference between the parties to arbitration.

Disputes arising between the parties, cross rules were obtained—on the part of the plaintiffs, to set aside the order of reference and to proceed to trial—and on the part of the defendants, for an attachment against the plaintiffs for not obeying the order of reference.

The case was on several occasions lengthily argued by *Talfourd*, Serjeant, and *F. Kelly*, for the plaintiffs, and by *Wilde*, Serjeant, and *Barstow*, for the defendants.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court: This case comes before us upon two cross rules which have been obtained—one, on the part of the plaintiffs, which calls on the defendants to shew cause why the verdict found for the plaintiffs on the trial of this cause

should not be set aside, and the order of reference made on such trial and the rule of court thereon should not be discharged, and why the plaintiffs should not be at liberty to proceed to the trial of this cause forthwith—the other, a rule obtained by the defendants calling on the plaintiffs to shew cause why a writ of attachment should not issue against the plaintiffs and against Mrs. Farden, who had become a party to the rule of reference, for not obeying the rule of reference.

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The action out of which these proceedings originated was an action upon a bond given by the defendant to the plaintiffs to secure the payment of the sum of 5,000*l.* by instalments, with interest, of which there remained about the sum of 2,000*l.* still due.

The defendants had been clerks of Mr. Whitton, a solicitor; and the sum secured by the bond was the consideration given upon their taking the business of Mr. Whitton on his death, calculated on the profits expected to be made. The bond was given to the plaintiffs as trustees for the benefit of the widow and infant children of Mr. Whitton, according to the provisions of a settlement made for that purpose, on the widow contracting a second marriage with one Farden, who was also a solicitor.

The defendants pleaded to the action on the bond, that it had been obtained by fraud and covin, upon which issue was joined. They had before filed a bill in Chancery, which was still pending at the time this action was brought, and which sought to set aside the transaction, or to obtain a deduction from the amount of the consideration paid for the business, on the ground that the cestui que trust, Mrs. Farden, had not acted consistently with her undertaking in regard to the business and the clients of the late Mr. Whitton.

At the time of the trial, Mrs. Farden had become for the second time a widow.

The cause having come on for trial before me, at Guild-

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hall, in February, 1836, and it appearing, from the nature of the inquiry about to be entered into, a cause that might be more satisfactorily decided by an arbitrator than by a jury at Nisi Prius, an order of Nisi Prius was made by consent, by which it was ordered that a verdict should be entered for 10,000*l.*, and the plaintiffs should be at liberty to enter up judgment thereon, but that no execution should issue until default should be made in manner therein mentioned; that, with the consent of the parties, and also of Mrs. Farden, the widow, who consented to become a party to the rule, a decree or order of the court of Chancery, in a cause of *Miller v. Morgan*, should forthwith be obtained, to refer it to one of the Masters of that court to inquire whether there ought to be any deduction from the amount of the principal and interest originally secured by the bond, in respect of the matters in dispute between the parties, and to state in what mode and from what portion or interest of such fund, such deduction, if any, should be made and satisfied, and to inquire and certify by whom the costs of the issues in the cause and the Chancery suit should be paid; and it was also ordered, that, on or before the 22nd March, 1836, the defendants should pay to the plaintiffs 150*l.* on account of interest on the bond, but that such payment should be without prejudice to either party in relation to the matters referred; that, in case of default of payment of the sum ultimately awarded, execution might be issued immediately; that the judgment should stand as a security for future breaches, but that the verdict and judgment should not prejudice either of the parties as to the matters referred; and that this order might be made a rule of court; which was done accordingly.

It is scarcely necessary to notice an observation which appears to have been on more than one occasion pressed on the attention of the Lord Chancellor in the course of the proceedings which took place in his court subsequently

to the order of reference, namely, that the court of Common Pleas was interfering with the jurisdiction of the court of Chancery, and in a manner dictating to that court what decree or order should be drawn up. It may be sufficient to observe that the terms of the order of reference were the terms agreed upon between the counsel employed in the cause, and not in any manner the terms directed by the court. In fact, the court which tried the cause knew nothing whatever of the state of the proceedings in the court of Chancery: it gave full credit to the learned counsel that the agreement entered into was one which was founded on the state of the proceedings in that court, and which by the course and practice of that court might be entered into and carried into effect; and in reality did no more than lend the sanction of the common law court to enforce the agreement entered into between the parties. In consequence of this order, various proceedings have taken place in the court of Chancery, both before the Vice-Chancellor and the Lord Chancellor. The plaintiffs insist in their affidavits that they have been willing throughout, and have endeavoured to the utmost of their power, to carry into effect the arrangement which has been made by the order of *Nisi Prius*, so far as the rules of the court of Chancery would allow. The defendants insist, on the other hand, that the plaintiffs have acted with bad faith towards them, and have endeavoured at every step to defeat the arrangement.

It is impossible to come to a correct conclusion on this point, which is now the real question in issue between the parties, by the mere perusal of the affidavits, which are equally strong in assertion in favour of the conduct of the respective parties. We have, therefore, considered with attention the notes of the proceedings before the Vice-Chancellor and the Lord Chancellor, with which we have been furnished; and, without recapitulating them on the present occasion, which would be altogether useless, the conclusion

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at which we have arrived is, that there has not been exhibited on the part of the plaintiffs a real and earnest endeavour to carry into effect the object and intention of the agreement entered into between the parties in this court; but, on the contrary, a determination on the part of the plaintiffs, on various occasions, to thwart the measures in the court of Chancery which were necessary to give full operation to the plan suggested by the order of *Nisi Prius*. And we cannot, therefore, but attribute the failure of the completion of the agreement to the wilful default on the part of the plaintiffs. Inasmuch, however, as the immediate ground upon which the former trial and the reference have become abortive, is, the not obtaining the aid of the court of Chancery in the manner contemplated and expected on the order of reference, and as the fund sought to be recovered is one in which the plaintiffs are trustees only, and in which infants are interested, we think we should not be justified in refusing to the plaintiffs the liberty to try the cause; but, at the same time, as we consider the ground of such failure attributable to the conduct of the plaintiffs and Mrs. Farden, in the progress of the proceedings in that court, we think the costs which have been uselessly incurred in this court ought to fall upon the plaintiffs and Mrs. Farden. Whilst, therefore, we make the rule obtained by the plaintiffs absolute, we do so upon the terms of payment of the costs of the day of the former trial by the plaintiffs, and the payment by the plaintiffs and Mrs. Farden of the costs incurred by the defendants in the several motions made in this court. And, with respect to the rule for the attachment, we direct the same to be enlarged, and to stand as a security for the payment of the costs before directed.

Rule accordingly.

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Tuesday,
Nov. 12th.

FITZGERALD v. WILLIAMS.

ASSUMPSIT on a bill of exchange, by indorsee against drawer. The declaration stated that the defendant, on the 13th March, 1837, made his bill of exchange in writing, and directed the same to one T. W. Warre, and thereby required Warre to pay to his the defendant's order 100*l.*, for value received, two months after the date thereof, which period had elapsed before the commencement of the suit; that the defendant indorsed the bill to the plaintiff, and that Warre did not pay the bill, although the same was presented to him on the day when it became due: Averment, that, neither at the time when the bill was drawn, nor at any time afterwards and before the bill became due, nor at the time when the same became due and was so presented for payment thereof, had Warre in his hands any effects of the defendant, nor had the defendant ever any reasonable ground for expecting that he had or would have any effects in the hands of Warre, or that Warre would accept the bill, or pay or discharge any part of the amount of the bill, or be provided with funds wherewith Warre ought to pay the bill or any part thereof; nor was there any consideration or value for the acceptance by him of the bill, or the payment by him of the amount of the bill or any part thereof; *nor had the defendant sustained any damage by reason of his not having had notice of the non-payment of the bill by Warre:* and thereupon the defendant, in consideration of the premises, afterwards, to wit, on the 1st January, 1838, promised the plaintiff to pay him the amount of the bill on request; yet the defendant had disregarded his promise, and had not paid the amount of the bill, or any part thereof.

Pleas—first, that the bill was not presented to the acceptor for payment when due—secondly, that, by reason of the defendant not having had notice of the non-pay-

In an action against the drawer of a bill of exchange, the plaintiff, to excuse the want of a notice of dishonor, averred that the acceptor had no effects of the defendants in his hands, nor had the defendant any reasonable ground for expecting that he would have, or that he would pay the bill, nor was there any consideration for the acceptance or payment thereof, nor had the defendant sustained any damage by reason of his not having had notice of the non-payment of the bill by the acceptor. The defendant pleaded that he *was* damnified by the want of notice, the acceptor having promised to pay the bill:—Held, that the entire burthen of proving that he was damnified by the want of notice rested upon the defendant.

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ment of the bill by Warre, he was damnified in this, that, at the time when the bill was made and indorsed as in the declaration alleged, Warre promised the defendant to provide money for the payment of the bill when the same should become due and payable, and to indemnify and save harmless the defendant from any loss or damage for or by reason of his making the bill, of which the plaintiff then had notice; and that, at the time when the bill became due and payable, the agreement so made by and between Warre and the defendant was still in full force and effect, and not in anywise altered, rescinded, or annulled—verification.

The plaintiff joined issue on the first plea, and replied *de injuriâ* to the second.

The cause was tried before Park, J., at the last sitting in London in Michaelmas Term, 1838. The plaintiff rested his case upon proof of the presentment of the bill. On the part of the defendant, it was contended that the plaintiff was bound to go further, and to prove the facts alleged in the declaration in excuse for the want of notice of dishonor to the defendant. A verdict having been found for the plaintiff—

F. Kelly obtained a rule nisi for a nonsuit or for a new trial, on the ground, amongst others (59), that the plaintiff was bound to give *some* evidence to shew that the defendant had sustained no damage from the absence of a notice of dishonor.

Atcherley, Serjeant, and *R. V. Richards*, shewed cause.—It stands admitted upon the record that there were no effects of the drawer in the hands of the drawee either at

(59) There was nothing in the report of the learned judge to shew the course that was taken by him in presenting the case to the jury, and the counsel were not agreed upon the subject, and therefore the other objections were not considered by the court.

the time the bill was drawn, or at the time it became due. To entitle him to avail himself of the want of a notice, the defendant was bound to shew that he had sustained some damage by the absence of notice—a damage to some legal *right*, a damage for which he had a legal remedy. [*Tindal*, C. J.—Or that he had a reasonable expectation that the acceptor would provide for the bill.] The plea discloses only a bare promise to provide for the bill, without any consideration. [*Maule*, J.—If the drawer is entitled to notice, it is no excuse to say that he has sustained no damage by reason of the want of notice (60).]

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Kelly and *Barstow* in support of the rule.—The plaintiff was bound to give affirmative evidence in support of that part of his declaration which is denied by the second plea, and it was not competent to him to throw upon the defendant the burthen of disproving it. Had this occurred before the new rules, and with a plea of the general issue, it is clear that the plaintiff would have been bound to prove all the circumstances alleged in his declaration to dispense with notice. The new rules have in no degree altered the course of evidence in this respect. It is conceded that the defendant must prove his plea, must shew that he was damnified; but it was incumbent on the plaintiff to give *some* evidence in the first instance. This is like the case of an allegation in a plea in an action against the acceptor of a bill, that the defendant has had no consideration for his acceptance, with a replication taking issue thereon: there, the affirmative of the issue would clearly be upon the defendant; the course now adopted being to call upon the defendant to give *some* evidence of want of

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c. 16, s. 6, enacts, "that, in all actions upon the case for slanderous words to be sued or prosecuted by any person or persons in any of the courts of record at Westminster, or in any court whatsoever that hath power to hold plea of the same, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under 40s., then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same; any law, statute, custom, or usage to the contrary in any wise notwithstanding." Under that statute, the plaintiff would have been precluded from recovering costs if he had obtained *nominal damages*; and he cannot be in a better situation because he has recovered *nothing*. The 74th rule of Hilary Term, 2 Will. 4 (61), in no degree affects the question. [*Tindal*, C. J.—The statute did not contemplate the case of a plea of justification: double pleas were not then known. And it provides for a case where the damages are assessed at less than 40s.: here there is no assessment of damages at all.] In *Milner v. Graham*, 4 Dowl. 422, the defendant was held entitled to the costs of all issues found for him, although they exceeded the costs of those found for the plaintiff.

Bingham, in support of his rule.—The case is neither within the letter nor the spirit of the statute 21 Jac. 1, c. 16, s. 6: and, if it were so, that provision is repealed by the 4 Anne, c. 16, s. 5 (62), and the effect of the rule of Hilary

(61) Which provides, that "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.

(62) The 4th section enacts "that

it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence." And the 5th section fur-

Term, 4 Will. 4, 1st div. s. 7 (63). The words of the 21 Jac. 1, c. 16, s. 6, are limited to a case where damages have been assessed, and therefore do not apply to a case wanting that feature. The object of the enactment was to prevent frivolous actions for words the uttering of which could only occasion a very inconsiderable injury: it did not contemplate a case where by a plea of justification the slander is put upon the record, and no attempt is made to support it by evidence. The plaintiff could not be aware until he came to trial that the communication was made under circumstances that privileged or excused it. In *Hart v. Cutbush*, 2 Dowl. 456, it was held, that, if a defendant plead the general issue and several special pleas, and the jury find for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings and witnesses on those pleas: and Parke, J., said: "I have considered the matter very much, and I think that the plaintiff having been put to expense by the variety of the pleas, it is only fair that he should be reimbursed all the expenses to which he has been put." So, in *Spencer v. Hamerton*, 4 Ad. & E. 413, 6 N. & M. 22,

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ther provides, "that, if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court, or, if a verdict shall be found upon any issue in the said cause for the plaintiff or defendant, costs shall be also given in like manner, unless the judge who tried the said issue shall certify that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him."

(63) Which provides, that, "upon the trial, where there is more than one count, plea, avowry, or cogni-

zance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings," &c., &c.

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where several pleas were pleaded (in an action for a libel) under the statute 4 Anne, c. 16, and the defendant obtained a verdict on some of the issues, entitling him to the general costs of the cause, it was held that he was liable to pay the plaintiff, on the issues found for him, not only his costs of the pleadings, but his costs of preparing evidence on those issues. Lord Denman, speaking of *Hart v. Cutbush*, there says: "It has been objected that the consequence of holding that decision to be right will be, that issues which have become immaterial by the decision of some one, will always be tried out for the mere sake of costs, and that great waste of time and inconvenience and delay to other suitors will be occasioned. We do not think these consequences at all necessary; but, even if they were, they are not sufficient to prevent the statute of Anne from having that construction which appears most consonant to the intention of the legislature and to reason and justice."

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court:—The plaintiff declared in this case for defamatory words spoken of him in his profession of a surgeon, and the defendants pleaded to the declaration—first, not guilty—secondly, a justification that the words spoken were true. At the trial of the cause, no evidence whatever was given by the defendants upon the second issue, and the jury accordingly found their verdict upon that issue for the plaintiff. But, under the issue upon the first plea, of not guilty, the defendants proved that the words were spoken under circumstances which made the uttering of them a privileged communication, and upon that issue the verdict was for the defendants: and, the Master having disallowed the plaintiff's costs on the second issue, on the ground that the case fell within the statute of James, the present application was made to the court that the Master should

review his taxation, and allow the plaintiff his costs on the plea of justification and issue thereon found for him.

The plaintiff, under the statute 4 Anne, c. 16, would, in ordinary cases, be entitled to the costs of the plea found in his favour, there having been no certificate by the judge who tried the cause, that the defendants had probable cause to plead such matter; and that rule would govern the present case, unless it falls within the statute 21 Jac. 1, c. 16, s. 6, by which it is enacted, that, in all actions for slanderous words, if the jury find or assess the damages under 40s., then the plaintiff shall have and recover only so much costs as the damages so given shall amount unto. And on the part of the defendants it is argued, that, as the general issue has been found for the defendants, the plaintiff has recovered no damages at all, and therefore within the principle of that act is not entitled to any costs. But we think, adverting to the language of the clause referred to, it does not govern the present case. That statute intended only to provide for the case of frivolous actions of slander, where the jury, after hearing the merits, have decided affirmatively by their verdict that the plaintiff is entitled to less damages than 40s. on account of the words spoken. In this case, however, the jury have made no estimate at all of the damage sustained by the plaintiff, by reason of the defendants' excuse for speaking the words; so that it cannot be said that the damages might not far exceed the sum of 40s., if that question had come before the jury. The case referred to of *Milner v. Graham*, 2 Dowl. 422, appears to have no application to the present; as, in that case, the plaintiff recovered one farthing damages, and the point raised was in fact wholly different.

We think, upon the above ground, that the enactment of the statute of James does not apply to the present case, but that it must be governed by the statute of Anne; and we therefore make the rule absolute.

Rule absolute.

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*Monday,
Nov. 25th.*

By a memorandum of agreement (made subject to the approval of a meeting of the creditors to be specially called for that purpose according to the statute), between the plaintiffs, assignees of a bankrupt, and the defendant, it was agreed that the defendant should within two months pay to the plaintiffs 2012*l.*, supposed to be equal to 10*s.* in the pound upon all the debts then proved against the estate of the bankrupt; that the plaintiffs should retain out of the estate (to the extent of 500*l.*) such further sum as should be equal to 10*s.* in the pound upon debts not then known or ascertained;

STEAINES and Others, Assignees of ANTHONY BIRCH, a
Bankrupt, *v.* WAINWRIGHT.

THE declaration stated, that, by a certain memorandum, described therein as a memorandum to form the basis of an agreement, made the 11th September, 1838, between the plaintiffs as assignees of Anthony Birch, a bankrupt, of the one part, and the defendant of the other part, subject to the approval of a meeting of the creditors of the said Anthony Birch to be specially called for that purpose according to the act of parliament in that behalf, the defendant agreed to pay the plaintiffs as assignees as aforesaid, within two months from thence, the sum of 2012*l.*, which was thereby supposed to be equal to 10*s.* in the pound upon all the debts then proved or thereafter to be proved under the fiat against the said Anthony Birch; and the defendant thereby further agreed to pay the assignees of the estate and effects of the said Anthony Birch, or permit such assignees to retain out of the estate of the said Anthony Birch such further sums as should be equal to 10*s.* in the pound upon the debts of any creditors of the said Anthony Birch whose debts were not known or ascertained at the time of the making of the said agreement, such last-mentioned amount to be limited to 500*l.*; but it was thereby stated to be understood that the above amount did not include the debts of one Mr. Birch senior, and one Mr. Thomas Birch, amounting to 1900*l.* or thereabouts, which that the fiat should be worked in the usual way; that, after satisfaction of the defendant's lien, he should deliver up all securities in his hands, and that the defendant's claim of 500*l.* for a bonus, and 200*l.* for a certain lease, should be allowed in full, but that, subject thereto, his debt should undergo the examination and correction of an accountant; and that, after payment out of the estate of the full amount of the defendant's claims when ascertained, so far as the estate would extend, the surplus of the estate should be divided among the creditors, but the dividends of such as should previously have received 10*s.* in the pound should to that extent be paid over to the defendant in one week after the dividend should be declared, but that the excess beyond 10*s.* in the pound should belong to the creditors:—Held, that the agreement was void, inasmuch as it professed to stipulate for an administration of the bankrupt's estate that was at variance with the bankrupt laws, and there was no mutuality.

it was thereby stated, if proveable under the fiat, they would be entitled to take their dividend upon the amount they should be allowed to prove; and it was thereby provided, that, in case the defendant should procure a discharge to the assignees of the estate and effects of the said Anthony Birch from any claim in respect of any debt so proved, or should obtain a transfer of any such debt to himself, then the defendant should be entitled to receive back from the assignees of the estate and effects of the said Anthony Birch, or retain, the amount which the defendant should have paid them for or in respect of any such debt; and it was thereby agreed that the fiat should be worked in the usual way, and that the assignees of the estate and effects of the said Anthony Birch should dispose of all the bankrupt's property, out of which the defendant's liens as thereby recognized were to be retained, and that, after satisfaction of the defendant's liens, he the defendant should deliver up all securities remaining in his hands or power, and that the defendant's claim of 500*l.* as a bonus, and 200*l.* for a certain lease, should be allowed in full, but that, subject thereto, his the defendant's debt should be subject to the examination and correction of one Chapman, accountant; and it was thereby further agreed that the assignees of the estate and effects of the said Anthony Birch should pay out of the estate of the said Anthony Birch all the costs incurred previously to and incidental to the bankruptcy of the said Anthony Birch, such costs to be settled by one Palmer, solicitor, subject to the above, and that, after payment out of the estate of the said Anthony Birch to the defendant of the full amount of his the defendant's claim when ascertained, so far as the estate would extend, the surplus of the estate should be divided under the fiat among the creditors, but that the dividends of such of them as should previously have received 10*s.* in the pound, should to that extent be paid over to the defendant in one week after such dividend

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Averment that
 agreement ap-
 proved of.

Breach.

should have been declared, but that the excess beyond 10*s.* in the pound should belong to the creditors, and that the accountant of the defendant should have access to the books and estate of the said Anthony Birch for all reasonable purposes; and that the terms of that agreement should be ratified by a proper deed: And, the said memorandum being made as aforesaid, afterwards, to wit, on the day and year aforesaid, in consideration thereof, and also in consideration that the plaintiffs, as assignees as aforesaid, at the special instance and request of the defendant, had then faithfully promised to perform and fulfil the said agreement in all things therein contained on the part and behalf of the plaintiffs as assignees as aforesaid to be performed and fulfilled, he the defendant faithfully promised the plaintiffs as assignees as aforesaid to perform and fulfil the said agreement in all things therein contained on his the defendant's part and behalf to be performed and fulfilled. Averment, that afterwards, to wit, on the 8th October, 1838, a meeting of creditors of the said Anthony Birch was specially called for the purpose of approving of the said agreement, according to the said act of parliament; and that at such meeting the said agreement was duly approved by the creditors of the said Anthony Birch according to the said act of parliament: that, from the time of the making of the said agreement hitherto they had been ready and willing as such assignees as aforesaid to ratify the terms of the said agreement by a proper deed, whereof the defendant during all the time aforesaid had notice; yet the defendant, not regarding the said agreement, or the promise so made by him in that behalf as aforesaid, did not within two months from the making of the said agreement pay, nor had he yet paid to the plaintiffs, so being such assignees as aforesaid, the said sum of 201*2*l., or any part thereof, and the same still remained wholly due and unpaid from the defendant to the plaintiffs as assignees as aforesaid, although the defendant before and at and after

the expiration of two months from the making of the said agreement, to wit, on the 1st, the 6th, and the 12th days of November, in the year aforesaid, was requested by the plaintiffs as assignees as aforesaid so to do, contrary to the tenor and effect, true intent, and meaning of the said agreement, and of the promise of the defendant so by him made as aforesaid.

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To this count the defendant demurred specially, assign- Special demur-
ing for causes—that the consideration for the promise of rer.
the defendant in the said first count mentioned was void and illegal, as being contrary to the spirit and policy of the bankrupt laws: and also void and illegal, inasmuch as the promise made by the plaintiffs, which was laid to the consideration of the defendant's promise in the said first count, was not in their power to perform, nor could he the defendant have enforced the same against the plaintiffs, at all events without the express consent to and ratification of the agreement in the said first count mentioned by all the creditors of the said Anthony Birch whose debts were proveable under the said fiat against him; and that, if such express consent and ratification would support the promise made by the plaintiffs (which the defendant wholly denied), yet that it was not with proper certainty or in an issuable form averred in the said first count that all the said last-mentioned creditors did consent to and ratify the said agreement, but, on the contrary, the proper inference to be drawn from the averments in that respect in the first count mentioned was, that the said agreement was approved of only by the consent of the major part in value of the creditors who had proved under the said fiat and were present at the meeting in the said first count mentioned; and that it was not with proper certainty or in an issuable form averred in the said first count that all the creditors of the said Anthony Birch whose debts were proveable under the said fiat gave their consent to the said agreement in any manner that would bind them to

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it in law, nor was it alleged with proper certainty or in an issuable form that the creditors who were averred to have approved of the said agreement did consent to or ratify the same, nor was it stated how they approved of the same, nor that they consented to or ratified the same in any manner that would bind them to it in law, or that there was any consideration for their consent or ratification; and that it was not averred in the said first count with sufficient certainty, or in an issuable form, that the plaintiffs promised or undertook that the said creditors or any other persons besides the plaintiffs and the defendant, whose acts or consents were or should be requisite for the carrying into effect the terms of the said agreement, should do or perform such requisite acts, or give their consent; and that the said first count was in other respects uncertain, informal, and insufficient.

The plaintiffs joined in demurrer (64).

Sir F. Pollock (*Chilton* and *E. V. Williams* were with him), in support of the demurrer.—There was no consideration which the law can recognize for the payment by the defendant of the sum mentioned in the agreement—no advantage to the defendant, no loss or detriment to the plaintiffs. It is, indeed, not very apparent what the plaintiffs mean to rely on as the consideration for the defendant's promise. The 88th section of the 6 Geo. 4, c. 16, which is the only clause that can be supposed to apply,

(64) The points marked for argument on the part of the plaintiffs were:—1. That the agreement on their part as assignees, more especially when sanctioned by a meeting of creditors, formed a sufficient consideration for the defendant's promise. 2. That, supposing the agreement could not in all its parts be enforced against the bankrupt's

estate, yet the defendant, having entered into the agreement with a full knowledge of the facts of the case, could not, whilst the plaintiffs were willing to perform the agreement on their part, refuse to perform his part of it.

For the defendant—that the consideration for his promise was not sufficient in law.

enacts, "that the assignees, with the consent of the major part in value of creditors who shall have proved under the commission, present at any meeting whereof and of the purport whereof twenty-one days' notice shall have been given in the London Gazette, may compound with any debtor to the bankrupt's estate, and take any reasonable part of the debt in discharge of the whole, or may give time or take security for the payment of such debt, or may submit any dispute between such assignees and any persons concerning any matter relating to such bankrupt's estate, to the determination of arbitrators to be chosen by the assignees and the major part in value of such creditors and the party with whom they shall have such dispute, and the award of such arbitrators shall be binding on all the creditors; and the assignees are thereby indemnified for what they shall do according to the directions aforesaid; and no suit in equity shall be commenced by the assignees without such consent as aforesaid; provided that, if one third in value or upwards of such creditors shall not attend at any such meeting (whereof such notice shall have been given as aforesaid), the assignees shall have power, with the consent of the commissioners, testified in writing under their hands, to do any of the matters aforesaid." The assignees had no power to make such a bargain as this; nor could the creditors ratify it, unless by personal agreement of each and every of them. In *Nerot v. Wallace*, 3 T. R. 17, a promise made by a friend of a bankrupt when he was on his last examination, that, in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, was held void, as being against the policy of the bankrupt laws. Lord Kenyon there says: "I do not say that this is nudum pactum: but the ground on which I found my judgment is this, that every person who in consideration

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of some advantage either to himself or to another promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact but in law." Besides, supposing the agreement to be perfectly legal, the action is misconceived. The memorandum contemplated a further and more formal agreement: the action is not for a refusal to execute such formal agreement; but the breach assigned is, that, although the plaintiffs were ready and willing to ratify the terms of the agreement by a proper deed, the defendant did not pay the 2012*l.* The defendant might be liable to an action for not executing the deed (65), but clearly he is not liable to an action in the present form.

Wilde, Serjeant (*Manning* was with him), contra.—The substance of the agreement is, that the defendant should pay to the assignees 2012*l.*, supposed to be equal to 10*s.* in the pound upon all debts then proved against the estate of the bankrupt; that the assignees should retain (to the extent of 500*l.*) such sum as should be equal to 10*s.* in the pound upon debts thereafter to be proved; that the defendant should give up all securities in his hands; that his claim to the extent of 700*l.* should be allowed in full, the residue of his debt to be subject to the correction of an accountant; and that, after payment of the full amount of the defendant's claims when ascertained, the surplus of the bankrupt's estate should be divided among the creditors. The court will not measure the value of the consideration: and if they would the consideration here would be found ample; the assignees agree to admit in full the defendant's claim to the extent of 700*l.*, and to refer the residue for adjustment by an accountant, either of which would be a sufficient consideration. And it is no objection that part of the consideration is that a man will do an act which he

has no power to do, provided it be not contrary to law or immoral. The declaration avers that a meeting of the creditors was specially called for the purpose of approving of the agreement according to the statute, and that at such meeting the agreement was duly approved by *the creditors*. This is an allegation that *all* the creditors agreed. In *Kaye v. Bolton*, 6 T. R. 136, a covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they would not proceed any further under the commission, was held to be good in law. It was there contended that the agreement was illegal, inasmuch as it did not appear to have been made with the consent of all the creditors: but the court said it sufficiently appeared that all the creditors were parties to the agreement, the words used being "*the creditors*." The defendant has nothing to do with the rights of the creditors: and there is nothing in this agreement that may not well be done consistently with their interest, or that it is not competent to the assignees to carry into effect. At all events, if there be anything in the objections, they ought to have been put upon the record.—Either party had power to call upon the other to execute a more formal deed, but it was not necessary to do so: the defendant has by the agreement expressly undertaken to pay the 2012*l.* in a given time; for the breach of that agreement, he is clearly liable to an action. An agreement to take premises for a term may amount to a lease, although a future more formal instrument is contemplated, where there are mutual intermediate obligations.

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Sir F. Pollock, in reply.—This is not the *agreement* the parties intended to bind themselves by; it is expressly declared that the memorandum upon which this action is brought is only to form the basis of an agreement. But the more important question is, whether there is any legal and valid consideration for the defendant's undertaking.

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It is admitted that the agreement can have no force without the consent of the creditors: and such consent can only be obtained at a meeting convened in the manner and for the purposes pointed out by the statute. There is nothing in the statute to warrant such a mode of dealing with the estate as that contemplated.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:— This is an action brought by the assignees of one Birch, a bankrupt, to recover from the defendant the sum of 2012*l.* under an agreement made between the assignees and the defendant, and set forth in the declaration.

By that agreement, which was made subject to the approval of a meeting of the creditors to be specially called for that purpose according to the act of parliament in that behalf, the defendant agreed to pay to the plaintiffs, as assignees, within two months from thence, 2012*l.*, supposed to be equal to 10*s.* in the pound upon all the debts then proved, and further to pay or permit the assignees to retain out of the estate such further sum as should be equal to 10*s.* in the pound upon debts not then known or ascertained, such last-mentioned amount to be limited to 500*l.*; but it was to be understood that the above amount did not include the debts of Mr. Birch sen. and Mr. Birch jun., amounting to about 1900*l.*, upon which, if proveable, they would be entitled to their dividend upon the amount they should be allowed to prove: and it was provided, that, if the defendant should obtain a discharge to the assignees or a transfer to himself of any such debt so proved, he should be entitled to receive back or retain the amount which he should have paid on any such debt. It was further agreed that the fiat should be worked in the usual way, and the assignees should dispose of all the bankrupt's property, out of which the defendant's liens, as thereby recognized, were to be retained; that, after satisfaction of the

defendant's liens, he should deliver up all securities in his hands; and that the defendant's claim of 500*l.* for a bonus and 200*l.* for a certain lease should be allowed in full, but that, subject thereto, his debt should be subject to examination and correction of an accountant; that the assignees should pay out of the estate the costs previous to and incident to the bankruptcy; and that, after payment out of the estate of the full amount of the defendant's claims when ascertained, so far as the estate would extend, the surplus of the estate should be divided among the creditors, but the dividends of such as should previously have received 10*s.* in the pound should to that extent be paid over to the defendant in one week after the dividend should be declared; but that the excess beyond 10*s.* in the pound should belong to the creditors; and that the terms of the agreement should be ratified by a deed.

It was averred in the declaration that a meeting of the creditors was specially called for the purpose of approving of the agreement, according to the act of parliament, and that at such meeting the said agreement was duly approved by the creditors, according to the said act of parliament: but, as the act, 6 Geo. 4, c. 16, s. 88, which gives validity to certain acts approved by the major part in value of the creditors present at a public meeting duly convened, does not extend to an agreement of the description above mentioned, no aid can be derived from the approval alleged: and the legal effect of the agreement must depend upon the provisions which it contains.

After a careful consideration of these provisions, it appears to us to be clear that the defendant, as a consideration for the payment of the amount which he engages to pay, being 10*s.* in the pound upon all the debts proved except those of Birch sen. and Birch jun., stipulates that he shall receive out of the estate the full amount of 500*l.*, called a bonus, and 200*l.* for a lease, in preference to all the other creditors except the two above specified, who are

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to prove and receive their dividends as if no agreement had been made, and who therefore are in no way affected by it; and, further, that the whole of his debt when ascertained should be entitled to a similar preference.

This agreement may possibly be very beneficial to the creditors; and the commencement of this action by the assignees against the defendant affords reason to suppose that it has been so considered. But it professes to stipulate for an administration of the bankrupt's estate which is at variance with the bankrupt laws: and as *all* the creditors are not bound by it, it could not be enforced by the defendant against the assignees of the estate so as to give him the benefit which it is the object of the provisions on his part to secure. The assignees had no right to enter into a contract with a particular creditor, that, in a certain event, he should receive out of the estate the full amount of any debt. It was their duty to make an equal distribution of the effects among the creditors in proportion to all the debts of the bankrupt.

What the true meaning of that part of the agreement may be which relates to the defendant's liens being recognized thereby, it is unnecessary to consider; because we think, for the reasons above given, that the stipulation for the payment to the defendant of the two sums of 500*l.* and 200*l.* in full, as well as his whole debt when ascertained, being illegal, the arrangement contemplated by the agreement is void.

We are therefore of opinion that judgment upon the demurrer to the declaration must be given for the defendant.

Judgment for the defendant.

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STORY v. RICHARDSON and Another.

*Thursday,
Nov. 21st.*

CASE.—The first count of the declaration stated, that, before and at the time of the retainer and employment of the defendants, and of their committing the grievance thereafter mentioned, the defendants exercised and carried on the business of accountants; that also before the said retainer and employment, and before the committing of the said grievance, to wit, for and during the year 1834, the plaintiff, together with one Hugh James and Richard Robinson, had carried on the trade and business of tailors in copartnership, and they, at the time of such retainer and employment, continued to carry on that trade and business in copartnership, and there were divers accounts subsisting between and amongst them in reference to the said copartnership during the said year 1834, and they were desirous of having the same investigated, made up, and settled; and thereupon, on the 1st January, 1835, the plaintiff, at the request of the defendants, and for reward to them in that behalf, retained and employed them as such accountants, to investigate, settle, and make up the accounts of the said copartnership for and during the said year 1834, and to make and draw up a final balance of such accounts, and the respective balances due to each of them, the plaintiff, Hugh James, and Richard Robinson, and to prepare a correct statement in writing shewing such final balance of such accounts, and the respective balances due to each of the partners; and the defendants then accepted and entered upon the said retainer and employment: and thereupon it then became and was their duty as such accountants, under the said retainer and employment, to take due and proper care, and use and employ due and proper skill and diligence in and about the investigating, settling, and making up the accounts of the said copartnership during the said year, and in making

The plaintiff declared in case against the defendants, accountants, alleging negligence in the making out accounts in which he and his two partners were interested, in consequence of which the plaintiff sustained damage:—
Held, that evidence that the defendants were retained and employed by the firm sustained an allegation of a retainer and employment by the plaintiff.

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and drawing up a final balance of such accounts, and the respective balances due to each of the partners, and in and about the preparing the said statement: that the defendants did thereupon proceed to investigate, settle, and make up the said accounts for and during the said year, and did make and draw up certain balances as and for the said balances so to be by them made and drawn up as aforesaid, and did prepare a statement in writing as and for the statement so by them to be prepared as aforesaid: Yet the defendants, not regarding their duty in that behalf, did not nor would take due and proper care, and use and employ due and proper skill and diligence in and about the investigating, settling, and making up the said accounts for and during the said year, and in and about the making and drawing up a final balance of such accounts, and the respective balances due to each of the partners, and in and about the preparing the said statement; but, on the contrary, took so little and such bad care, and used and applied so little skill and diligence in that behalf, that, by reason of the carelessness, unskilfulness, and negligence of the defendants in that behalf, the said balances so to be by the defendants drawn up as aforesaid, were grossly incorrect, erroneous, and improper balances; and the said statement so by them prepared was an incorrect, erroneous, and imperfect statement, containing divers errors, mistakes, omissions, and imperfections, and shewing and stating an incorrect statement of the said accounts during the said year, and an incorrect balance of the same, and incorrect balances actually due to each of the partners: And the plaintiff in fact said, that he, confiding in the defendants' performance of their said duty, and not knowing of the breach of the same, and believing that the said balances so made and drawn up by the defendants were correct, and that the said statement so made by the defendants was a correct statement, and not knowing to the contrary thereof, afterwards, to wit, on the 15th March, 1836,

did, with the said Hugh James and Richard Robinson, agree to admit that the said balances so made and drawn up were correct balances, and that the said statement so made by the defendants was a correct statement: that the affairs of the firm having been submitted to arbitration, and the arbitrator having made an award conformable to the defendants' statement of the accounts, the plaintiff, by means of the premises and of the award, and in pursuance thereof, was afterwards obliged to pay to Hugh James the sum of 2850*l.* awarded to be paid to him, and afterwards placed to the credit of Richard Robinson the sum of 3600*l.* in a new firm of Story & Robinson, awarded to be placed to that credit: and by means of the several premises the plaintiff lost and was deprived of the said sums of money, which the arbitrators, but for the misfeasance of the defendants, would not have awarded to be paid by the plaintiff, and to be placed by him to the credit as aforesaid: to the plaintiff's damage of 5000*l.*

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The defendants pleaded—first, not guilty—secondly, *Pleas.* that the plaintiff did not retain or employ them in manner and form as in the first count mentioned.

The cause was tried before Tindal, C. J., at the sittings at Westminster after Michaelmas Term last. The action was brought by one member of a firm to recover a compensation in damages for an injury resulting to him from the negligence of the defendants. It appeared that the defendants as accountants had been employed by the firm of which the plaintiff was a member to prepare a statement of the partnership accounts to enable arbitrators to settle the terms upon which the partnership should be dissolved, and the balances due to the respective partners; and that, through the negligence of the defendants in inaccurately preparing the accounts, the plaintiff sustained a considerable loss.

On the part of the defendants it was objected that there was a fatal variance between the allegation of employ-

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ment in the declaration, and the proof—it appearing that the defendants had been retained by *the firm*, and not, as alleged, *by the plaintiff*.

His lordship overruled the objection, and a verdict was found for the plaintiff, the damages to be the subject of a reference; and leave was reserved to the defendants to move to enter a nonsuit, and to the plaintiff to amend the declaration, if the court should be of opinion that the objection was well founded.

Sir F. Pollock, in Hilary Term last, accordingly obtained a rule nisi.

Wilde, Serjeant, *Crowder*, and *Hoggins*, now shewed cause.—There was a several employment of the defendants by each of the partners, as well as a joint employment by the firm. The action is founded in tort: the plaintiff, who is the only person injured, could alone sue for the injury. It is immaterial who retained or paid them, if the defendants had a separate duty to perform to the plaintiff, and he by reason of their neglect has sustained damage. In *Gladwell v. Steggall*, 7 Scott, 60, 5 New Cases, 733, a declaration in case against a surgeon for negligence alleged that *the plaintiff*, at the request of the defendant, *had employed the defendant* to bestow the care &c. of him, the defendant, in the profession and business of a surgeon and apothecary, &c., and the defendant then accepted and entered upon such employment as such surgeon; and then proceeded to allege the duty resulting from such retainer: and it was held that it was immaterial *by whom* the defendant was retained, though a distinct issue was taken by the plea upon the retainer; and that, if the allegation of employment *by the plaintiff* was material, it was supported by proof that the plaintiff (a child about twelve years old) submitted to and received the defendant's attendance. At all events, the court may amend the decla-

ration, if it be necessary, notwithstanding a distinct issue has been taken upon the allegation of employment—*Gladwell v. Steggall*; the misstatement not being one that was calculated to mislead the defendants, or in a matter affecting the merits of the case (66).

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Sir F. Pollock, Talfourd, Serjeant, and F. V. Lee, in support of the rule.—This is substantially an action *ex contractu*, and it is not competent to the plaintiff to sue as for a tort, alleging that as a *duty* which in effect was a *promise*, and so subject the defendants to the risk of a multiplicity of actions. In *Weall v. King*, 12 East, 452, upon a declaration in case, alleging a deceit to have been effected upon the plaintiff by means of a warranty made by two defendants upon a *joint* sale to him by both of sheep, their joint property, it was held that the plaintiff could not recover upon proof of a contract of sale and warranty by one only as of his separate property; the action, though laid in tort, being founded on the *joint* contract alleged.—So, in *Ireland v. Johnson*, 1 New Cases, 162, 4 M. & Scott, 706, it was held, that, in case for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due, and a variance in this respect is fatal. [*Tindal*, C. J.—Is it the less true that the defendants were employed by the plaintiff, because they were also employed by the other members of the firm? I see very little distinction between the present case and *Mountstephen v. Brooke*, 1 B. & Ald. 224, where the declaration stated a bill of exchange to be drawn upon and accepted by three persons, and it was proved to have been drawn upon and accepted by the three jointly with a fourth; and it was held that this was no variance: Lord Ellenborough saying: “Actions on promissory notes, where two jointly and severally promise, and one only is declared against, are of frequent occur-

(66) See the authorities collected in Jervis's Rules, 4th edit., 203, 4.

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rence, and in my experience I have never known an exception taken against that form of declaring, on the ground of variance. The plaintiff has stated enough to charge the persons sought to be charged in this form of action. It is sufficient for him that the bill was drawn upon and accepted by the three defendants, and by proving that fact he satisfies the description stated in his declaration.”] The principle that was recognized in that case is, that one of several co-contractors may be sued, and the plaintiff may recover, unless the non-joinder of the others be made the subject of a plea in abatement. But here the objection is that the contract out of which the alleged duty arises is not truly stated: the duty is a different duty from that charged in the declaration. And the difficulty as to an amendment of the record, is, that the attention of the plaintiff was called to the defect by the second plea.

TINDAL, C. J.—We are called upon in this case to say whether or not there is a variance between the allegations in the declaration and the evidence given at the trial. I am of opinion that there is not. The objection is, not that James and Robinson ought to have been parties to the action, for, being in tort, that could only be the subject of a plea in abatement; but that the contract out of which the alleged duty arises is not truly stated in the declaration. The allegation is that “the plaintiff, at the request of the defendants, and for reward to them in that behalf, retained and employed them as accountants to investigate, settle, and make up the accounts of the co-partnership [of the plaintiff with James and Robinson] for and during the year 1834, and to make and draw up a final balance of such accounts, and the respective balances due to each of them, the plaintiff, James, and Robinson, and to prepare a correct statement in writing shewing such final balance of such accounts, and the

respective balances due to each of the partners ; and the defendants then accepted and entered upon the said retainer and employment ; and thereupon it then became and was their duty as such accountants, under the said retainer and employment, to take due and proper care, and use and employ due and proper skill and diligence in and about the investigating, settling, and making up the accounts of the said co-partnership during the said year, and in making and drawing up a final balance of such accounts, and the respective balances due to each of the partners, and in and about the preparing the said statement." Down to a certain point the duty charged was in respect of a matter in which the three partners had an interest in common ; but as to the separate balances their interests were adverse. The declaration then goes on to allege that " the defendants, not regarding their duty in that behalf, did not nor would take due and proper care, and use and employ due and proper skill and diligence in and about the investigating, settling, and making up the said accounts for and during the said year, and in and about the making and drawing up a final balance of such accounts, and the respective balances due to each of the partners, and in and about the preparing the said statement ; but, on the contrary, took so little and such bad care, and used and applied so little skill and diligence in that behalf, that, by reason of the carelessness, unskilfulness, and negligence of the defendants in that behalf, the said balances so to be by the defendants drawn up as aforesaid were grossly incorrect, erroneous, and improper balances ; and the said statement so by them prepared was an incorrect, erroneous, and imperfect statement, containing divers errors, mistakes, omissions, and imperfections, and shewing and stating an incorrect statement of the said accounts during the said year, and an incorrect balance of the same, and incorrect balances actually due to each of the partners." This allegation is altogether irreconcilable with a notion of any

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joint damage to the three. The facts disclosed in evidence were these:—The defendants were employed by the plaintiff and his partners to settle the partnership accounts, to make up a general balance, and also a statement shewing the actual balance due to each of the partners. There is nothing in this state of facts inconsistent with the allegation that *the plaintiff* retained and employed the defendants for the purpose stated in the declaration. There was no evidence of any joint damage sustained by the three partners: and it is no new proposition, that, where there is a joint contract, if either of the parties has a separate interest and cause of action, he may sue alone—*Eccleston v. Clipsham*, 1 Wms. Saund. 154, and the cases in the note thereto. I am therefore of opinion that this rule must be discharged.

BOSANQUET, J.—I am of the same opinion. This action is brought upon a contract in which the plaintiff and two others have a joint interest, and in which each is also separately interested. The plaintiff seeks to charge the defendants in respect of an injury to his separate interest. The defendants were employed to settle the accounts of the partners generally, and also to ascertain the particular balances due to each. I see no reason why one of the partners may not maintain an action for an injury resulting to him alone from the defendants' negligence. It is said that there is a variance between the allegation and the proof, the allegation being of a retainer *by the plaintiff*, and the proof of a retainer *by the plaintiff and his partners*. But it is not the less true that the defendants were employed by the plaintiff, because they were at the same time employed by others. If the injury had been joint, the non-joinder of James and Robinson could only have been taken advantage of by a plea in abatement. I think the evidence was sufficient to shew that the defendants had a separate duty to perform towards each of the partners

individually, and that the plaintiff has sustained an injury by the breach of that duty. The case of *Gladwell v. Steggall* seems to me not to be distinguishable from the present. There a declaration in case against a surgeon for negligence alleged that *the plaintiff*, at the request of the defendant, *had employed the defendant* to bestow the care &c. of him, the defendant, in the profession and business of a surgeon and apothecary &c., and the defendant then accepted and entered upon such employment as such surgeon; and then proceeded to allege the duty resulting from such retainer: and it was held that it was immaterial *by whom* the defendant was retained, though a distinct issue was taken by the plea upon the retainer; and that, if the allegation of employment *by the plaintiff* was material, it was supported by proof that the plaintiff (a child about twelve years old) submitted to and received the defendant's attendance.

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COLTMAN, J., was absent.

MAULE, J.—I am also of opinion that there is no variance in this case, and that there was ample evidence to substantiate the allegation of a retainer by the plaintiff: the defendants were in effect employed by the firm and by each member of it. There being disputes as to the partnership accounts, the defendants were called in to adjust the accounts between them, and to settle the balance due to each of the partners. The defendants owed a duty as well to each member of the firm as to the three. There was a contract with each partner, as well as a contract with the firm. Whether or not a duty arises from such contract that may form the subject of an action of this sort, is not now the question.

Rule discharged.

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*Monday,
Nov. 25th.*

By the rules of a mutual benefit society, portions of the stock or fund of the society were from time to time put up to competition amongst the members by way of loan at 5*l.* per cent. interest, in addition to the premium, the highest bidder obtaining the loan. The defendant, a member, bid 15*l.* 17*s.* 6*d.* for a loan of 80*l.*, with 5*l.* per cent. interest:—Held, that the transaction was not usurious.

SILVER and Others v. BARNES.

THIS was an action of assumpsit by the payees against the maker of a promissory note for 80*l.* and interest, bearing date the 18th April, 1839, and payable on demand.

The defendant pleaded that the promissory note in the declaration mentioned was a certain promissory note whereby the defendant and one S. E. Webber, J. Rice, and J. T. Elvis, as his sureties in that behalf, jointly and severally promised to pay the plaintiffs, on demand, 80*l.*, value received, with interest for the same; and that, before the making, delivery, and acceptance of the said promissory note, to wit, on the 17th April, 1839, it was corruptly and unlawfully, and against the form of the statute in that case made and provided, agreed between the defendant and the plaintiffs and divers other persons to the defendant unknown, with the privity and consent of the plaintiffs, that the plaintiffs and the said other persons, with the privity and consent of the plaintiffs, should lend and advance to the defendant from the fund or stock of a certain society called "The Woodbridge Mutual Benefit Society," the sum of 80*l.*; that the plaintiffs and the said other persons, with the privity and consent of the plaintiffs, should forbear and give day of payment thereof to the defendant as thereafter mentioned; and that the defendant, for the loan of the said 80*l.*, and for giving day of payment thereof, should give and pay to the plaintiffs and the said other persons, with the privity and consent of the plaintiffs, more than lawful interest at and after the rate of 5*l.* for the forbearance of 100*l.* for a year, on the said sum of 80*l.*, viz. that the defendant should pay and give to the plaintiffs and the said persons, with the privity and consent of the plaintiffs, a certain sum, to wit, 15*l.* 17*s.* 6*d.*, making, together with the said sum of 80*l.* so to be lent and advanced by the plaintiffs and the said other persons, the sum of 95*l.* 17*s.* 6*d.*,

for the preference of having the said loan of 80*l.*, to wit, by monthly instalments of 2*s.* upon every 10*l.* of the said sum of 80*l.*, until the whole of the said sum of 15*l.* 17*s.* 6*d.* should be paid, together with the interest of such loan of 80*l.*, after the rate of 5*l.* for 100*l.* by the year, from the 18th April, 1836, until the payment by the defendant of the said sum of 80*l.* to the plaintiffs and the said other persons; and that, for securing the repayment to the plaintiffs and the said other persons of the said 80*l.*, with interest thereon as aforesaid, the defendant and three other persons, as his sureties in that behalf, should make and deliver to the plaintiffs a certain promissory note in writing, whereby the defendant and the said three other persons as his sureties in that behalf should jointly and severally promise to pay to the plaintiffs, on demand, 80*l.*, value received, with interest for the same: that, in pursuance of the said corrupt and illegal agreement so made as aforesaid, the plaintiffs and the said other persons, with the privity and consent of the plaintiffs, afterwards lent and advanced to the defendant the said sum of 80*l.* from the fund or stock of the said society called The Woodbridge Mutual Benefit Society; and that, for securing the repayment to the plaintiffs and the said other persons of the said sum of 80*l.*, with interest for the same, the defendant, and S. E. Webber, J. Rice, and J. T. Elvis, as his sureties in that behalf, made and delivered to the plaintiffs the said promissory note in the declaration mentioned, and the plaintiffs then accepted and received the said promissory note in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid: Averment that the sum of 15*l.* 17*s.* 6*d.*, so as aforesaid agreed to be given and paid to the plaintiffs and the said other persons in manner aforesaid, for the purpose aforesaid, and the interest upon the loan of 80*l.* reserved and secured and made payable to the plaintiffs upon or by the said promissory note, exceeded the rate of 5*l.* for the forbearing and giving day of payment

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of 100*l.* for a year, contrary to the statute &c.: By means whereof, and by force of the said statute the said promissory note was void—verification.

To this plea the plaintiffs replied, that the promissory note was made and delivered by the defendant as in the first count mentioned, for a good and lawful consideration, and not in pursuance of or upon any such corrupt or unlawful agreement nor for such purpose as in the said plea mentioned, in manner and form as the defendant had in his said plea in that behalf alleged.

The cause was tried before Vaughan, J., at the last Assizes for the county of Suffolk. It appeared, that the plaintiffs were the treasurer and committee, and the defendant a member, of a society called The Woodbridge Mutual Benefit Society; that, on the 17th April, 1836, a sum of 80*l.* was put for sale pursuant to the 12th rule hereinafter set out; and that the defendant was the highest bidder, and consequently obtained the advance upon the terms mentioned in the declaration.

Rules of the
society.

The rules of the society in question were precluded by a statement, that, "Whereas the several persons members of this society, whose names are inscribed in the book containing the amount of their shares therein, have for their mutual benefit, by subscriptions every four weeks, raised a sum of money, and have agreed, by further monthly subscriptions, to be paid every Wednesday four weeks during the continuance of the said society as after mentioned, to raise a further sum of money, with the intention of afterwards lending or advancing the same to some of the said parties at interest at the rate of 5*l.* for 100*l.* by the year, in the proportions, in such manner, and under such regulations as are hereafter mentioned, so that every member of the society shall have advanced or allotted to him on loan a sum of money as after mentioned: and, in order to the more regularly and effectually carrying on the concerns of the said society, and promoting the intention of the

members thereof, the following rules, laws, and regulations have been agreed to, adopted, and signed by the said members, for their mutual observance."

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First rule.

By the 1st rule, it was provided that the society should meet every fourth week, computing from Wednesday, February 17th, 1836, at a time and place mentioned.

By the 8th, that "Every member of this society, his executors or administrators, shall pay to the treasurer or his deputy, or person acting as such, at every monthly meeting, during the first hour of business, viz. from half-past seven to half-past eight, 2s. 6d. upon every 10l. for which he shall subscribe, for the first forty nights of the society; after that time, 2s. upon every 10l.: and, when he shall have a loan or allotment of money from the fund or stock of the club, he shall also pay the additional subscription he shall agree to give for the preference of having such a loan, by monthly instalments of 2s. upon every 10l. so advanced or allotted to him, until the whole of such additional subscriptions shall be paid, together with interest for such loan or sum advanced, after the rate of 5l. for 100l. by the year."

Eighth rule.

By the 12th, that, "When the treasurer shall have in hand, at any of the monthly meetings, the sum of 20l. of the money so subscribed at any of the monthly meetings, the same shall be put up for sale, the highest bidder to be the purchaser, and he may have from the fund any sum not less than 20l. (except by the consent of the committee), nor more than the sum he subscribes for. He shall at the same time inform the secretary what sum he will take; and within one day inform the secretary, in writing, the names, trades, and places of abode of the persons he may propose as sureties for the money; and, upon giving approved security to the committee of the society for the same, shall have such advances or allotment of money paid to him by the treasurer, on paying the stamp-duty upon the security given and entered into by him and

Twelfth rule.

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his sureties. Should there at any time be no bidders, the money in hand shall be allotted by ballot. The first drawn shall be obliged to have the preference, and shall take all the money in hand, in case he can have it without a joint security; and if the person drawn does not take all the money, to continue drawing till it is disposed of. If any member do not take the money he agreed to have at any monthly meeting, he shall pay at the next monthly meeting one month's interest on the sum he so agreed to take, and also whatever sum may be deficient in the additional subscription which shall be agreed to be given at the next monthly meeting, when the same shall be disposed of. All monies that shall from time to time be disposed of by way of sale shall be secured to the society in the names of the treasurer and committee for the time being."

Fifteenth rule.

By the 15th, that "All monthly and additional subscriptions, interests, fines, forfeitures (except fines of the committee-men for neglecting to attend the monthly meetings of the committee at the time appointed), extra and other payments, shall be paid to the treasurer, and shall constitute or be the fund or stock of the society; and all expenses incurred by the treasurer and secretary, the committee, or any other member of the society, in or about the affairs and concerns of the said society, under the direction and authority of any monthly or special general meeting of the committee, shall be paid out of the fund or stock; but that not any of the fund shall be expended in feasting."

Sixteenth rule.

By the 16th, that "Immediate payment shall be made to the treasurer of all sums for which the members are or shall be liable under these or any subsequent rules, orders, or regulations, to be duly made; and which sums shall be recoverable by law as liquidated damages; or the treasurer, at his option, may retain and deduct the same from any money in his hands which shall have been subscribed by the person from whom such payments are to be made."

And by the 26th, "That the said society, and these rules, laws, and regulations, shall be, remain, and continue in full force and effect, and all and every of the members of the society shall be thereby bound, until all such members, or their assigns, executors, or administrators as aforesaid, respectively shall have borrowed and received the whole amount of the money for which they shall respectively have so subscribed, and until all arrears, fines, and forfeitures in and under any of the preceding rules shall be paid."

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Twenty-sixth
rule.

On the part of the defendant it was contended that the transaction was usurious, the sale being a mere contrivance to evade the statutes. The learned judge, however, was of opinion that the case was not one of loan, but an apportionment of partnership funds in which the defendant was interested in common with the rest of the members of the society: and he told the jury, that, if they thought the transaction *bonâ fide*, they must find for the plaintiffs; but that, if they thought it was a mere contrivance to obtain more than the legal interest upon an advance of money, they must find for the defendant.

The jury found a verdict for the plaintiffs; and leave was reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that the learned judge had taken an erroneous view of the case.

Biggs Andrews, on a former day in this term, moved to enter the verdict accordingly, or for a new trial.

TINDAL, C. J., now delivered the opinion of the court:— This was an action by the payees against the maker of a promissory note for 80*l.* and interest, given by a member of a mutual benefit society for an advance of money by the society. On the part of the defendant, it was contended at the trial that the transaction was usurious: but the learned judge was of opinion that it was not the com-

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mon case of a loan, but a mere advance or allotment of a portion of a partnership fund in which the defendant had an interest in common with the other members of the society. A motion has been made for a new trial on the ground of misdirection. But we think that the case was properly left to the jury. The question was, whether the transaction was a loan of money by the plaintiffs to the defendant, or a mode of dealing with the partnership fund. We are of opinion that it was a dealing with a partnership fund in which the defendant was interested equally with the other members of the society, and that it was not in fact a loan. The borrower was interested in the fund when the money was advanced as well as when it should be repaid by him. The sale was only a mode of settling the terms upon which the enjoyment of the money should take place: it was not a borrowing by the maker of the note from the payees. In a similar case, in the court of Exchequer, in December, 1828, I observe that Alexander, C. B., held such a contract not to be usurious.

Rule refused.

*Monday,
 Nov. 25th.*

A judge at chambers having set aside a plea on the ground that it was palpably a sham plea, and evidently designed to perplex and delay the plaintiff—the court refused to discharge the order.

BALMANNO v. THOMPSON.

ASSUMPSIT on a bill of exchange dated the 9th February, 1839, whereby the defendant required one John Hands to pay to his the defendant's order 17l. 10s. 6d., four months after date, with an averment of non-payment by Hands, and notice thereof to the defendant.

The defendant pleaded that the said bill of exchange in the first count mentioned was, to wit, on &c., made and drawn as in that count mentioned, by a certain person to the defendant unknown, who then wrote at the bottom of the said bill the initials of the Christian name and also the surname of the defendant without the licence or authority of the defendant, which was the supposed making of

the said bill of exchange by the defendant as in the first count mentioned; that the same was so made and drawn long after the day and time appointed by the commissioners of stamps for using the die and dies now in use for stamping bills of exchange, to wit, on &c. in the first count mentioned, and that the said bill of exchange was and is stamped with the old die which the said commissioners had then discontinued the use of, contrary to the form of the statute in such case made and provided; that the said bill of exchange was made and drawn for the accommodation and at the request of the said John Hands, and that the same was indorsed to the plaintiff as in the first count mentioned, by a certain person to the defendant unknown writing the initials of the Christian name and the surname of the defendant at the back of the said bill without the licence or authority of the defendant, and for the accommodation of the plaintiff, which was the said supposed indorsement by the defendant in the first count mentioned; nor did the defendant ever receive any value or consideration whatsoever for the said supposed drawing or indorsement of the said bill of exchange, or the payment of the amount, or of any part thereof; that the said indorsement was made to the plaintiff after the said bill had become due, and without any value or consideration whatever; and that the said bill of exchange was not presented to the said John Hands for payment; nor did the defendant have due notice of the non-payment thereof by the said John Hands.

An order having been made by Maule, J., at chambers, setting aside the above plea as a nullity—

Wilde, Serjeant, on a former day in this term, obtained a rule nisi to rescind that order, on the ground that the learned judge had assumed a jurisdiction not warranted by the practice of the court.

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Peacock now shewed cause.—The plea in question has almost every vice that a plea can have. It is double, and is in fact several distinct pleas informally pleaded (67), and was evidently intended to provoke a demurrer. That the court or a judge has jurisdiction to strike out a plea that is upon the face of it so contrary to all rule as to be an abuse of the process of the court, is clear from numerous authorities. Thus, in *Blewitt v. Marsden*, 10 East, 237, where a sham plea was pleaded of judgments recovered in the court of Pie poudre in Bartholomew Fair, in terms palpably fictitious, and out of the regular course, the court of King's Bench reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. This court pursued the like course in *Smith v. Hardy*, 1 M. & Scott, 676, 8 Bing. 435. In *Charles v. Marsden*, 1 Taunt. 224, Lawrence, J., says: "I remember a former case of a sham plea, where the pleader had raised a question of great difficulty, and, it being suggested that it was a sham plea, the court required an affidavit of the truth of the facts pleaded, considering it a most gross contempt to put questions of difficulty in the shape of a sham plea." In *Dawson v. Macdonald*, 2 M. & Welsby, 26, in an action on a bill of exchange, by indorsee against acceptor, the defendant, having obtained an inspection of the bill, pleaded pleas denying the acceptance, the drawing, and the indorsement, and also a plea founded on the 3 & 4 Will. 4, c. 97, s. 17, that the bill was written on paper improperly stamped with an old die: and the court struck out the last plea. In *Horner v. Keppel*, 2

(67) "If a party plead several pleas, avowries, or cognizances without a rule for that purpose, the opposite party shall be at liberty to sign judgment." Reg. Gen. Hilary Term, 2 Will. 4, s. 34.

P & D. 234, the court recognized the practice laid down in the authorities above cited, though the circumstances of that case did not appear to them to warrant its adoption. But, in *Knowles v. Burward*, 2 P. & D. 235, which was an action by an indorsee of a bill of exchange against the acceptor, a plea that the drawer did not pay its amount to the acceptor as the consideration of the acceptance, was held frivolous, and the court made absolute with costs a rule for signing judgment as for want of a plea. And in *Bradbury v. Emans*, 5 M. & Welsby, 595, where to an action on a bill of exchange, by indorsee against acceptor, the defendant pleaded, that, after the bill had been indorsed to the plaintiff, and before it became due, and before he had notice of such indorsement, he gave another bill to the drawer, by way of renewal, and in lieu of the first-mentioned bill; and that he had not before or at the time he accepted the latter bill, or at any time before the commencement of the suit, any notice that the first bill of exchange had been indorsed to the plaintiff, and the defendant did not then, nor until after the same became due, know that the plaintiff was the holder of the bill—the court of Exchequer, after consulting with the judges of this court, set aside the plea as frivolous.

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Bompas, Serjeant, in support of the rule.—Where the plea is manifestly a nullity, and only calculated to perplex the plaintiff, no doubt the court has jurisdiction to set it aside: but there must be an affidavit that the plea is false. [*Tindal*, C. J.—It does not appear that there was any such affidavit in *Blewitt v. Marsden*.] In *Richley v. Proone*, 2 D. & R. 661, 1 B. & C. 286, *Merrington v. Beckett*, 3 D. & R. 231, 2 B. & C. 81, *Smith v. Hardy*, 1 M. & Scott, 676, 8 Bing. 435, *Miley v. Walls*, 1 Dowl. 646, *La Forest v. Langan*, 4 Dowl. 642, and *Lewis v. Ker*, 5 Dowl. 327, there was an affidavit of the falsity of the plea. If this plea is to be set aside on the ground that it involves a

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multiplicity of defences, there will be an end to demurrers for duplicity. In *Cowper v. Jones*, 4 Dowl. 591, the plea was clearly insufficient in point of law, but that was held to be no ground for treating it as a nullity. *Patteson*, J., there says: "Unless the defendant was under terms of pleading issuably, or the plea pleaded raised a different [difficult?] issue, the court cannot interfere. The plea may contain a statement of facts which may or may not be true, and which are not sufficient in point of law as an answer to the action. That, however, is not a reason for setting it aside. I have not the power to do it. I know the court some years ago used to interfere where the plea was frivolous, and authorize the plaintiff to sign judgment as for want of a plea. But the courts afterwards retraced their steps, on the ground of a doubt they had as to their power so to do. The court, therefore, now never interferes, unless the defendant is under terms to plead issuably; or under some special circumstances. The mere insufficiency of a plea in point of law does not entitle the plaintiff to sign judgment as for want of a plea." [*Bosanquet*, J.—That learned judge says, in *Horner v. Keppel*, 2 P. & D. 234—"If *Cowper v. Jones* is rightly reported, I repudiated the jurisdiction of the courts over these cases: if I did, I was wrong."] Mr. Baron Parke on a late occasion refused to set aside a plea in this very form. [*Tindal*, C. J.—He will not do so again.] In *Knowles v. Burward*, 2 P. & D. 235, the plea was mere nonsense: here it does disclose *some* defence to the action. [*Tindal*, C. J.—It contains every possible defence, together with many matters that afford no defence.] The defendant ought not to be deprived of his writ of error.

TINDAL, C. J.—I am of opinion that this rule ought to be discharged, and that the order of my Brother Maule ought to stand. It is perfectly clear that the courts have power and authority to interfere in a summary way, where they

cannot but see that the plea is intended to perplex and confound instead of entering upon a real defence. The plea here embraces so many answers in law and in fact, that it is impossible not to see in it a studied design, by heaping together every possible answer to the action, to embarrass the plaintiff in his reply. The cases in which this jurisdiction has been exercised by the courts since *Blewitt v. Marsden* are very numerous. Though they will not interfere where there is a reasonable doubt, where the sufficiency or insufficiency of the plea is a mere measuring cast, the court is bound to do so where the plea is clearly informal, and manifestly intended to harass and delay the plaintiff.

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BOSANQUET, J.—I am of the same opinion. I think it would be much to be lamented if the courts did not possess the power to interpose to prevent abuses of this sort. The pleading the plea in question is offering an insult to the court, and is so manifest an abuse of its proceedings that we can and ought to set it aside. Independently of the defective nature of the plea itself, it is evident that it is an attempt to evade the rule of court which authorizes a plaintiff to sign judgment where the defendant pleads several matters without the authority of the court. Each branch of it is the subject of a separate and distinct plea.

COLTMAN, J., was absent.

MAULE, J.—I also think, that, in discharging the present rule, we shall not be going further than the courts have already gone in numerous instances of the like nature. It is suggested, that, by setting aside the plea in this summary manner, we deprive the defendant of his writ of error. The same objection might be urged in all cases where the plea is set aside: and the mischief of

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allowing the insufficiency only to be taken advantage of by demurrer would be infinitely greater.

Rule discharged, with costs.

LACKINGTON and Others, Assignees of GEORGE RICHARDSON, a Bankrupt, v. COMBES.

Tuesday,
Nov. 12th.

To an action at the suit of assignees of a bankrupt for 48*l.*, the price of a phaeton which the defendant had purchased from the bankrupt for cash on delivery, the defendant pleaded, that, before and at the time of the delivery of the phaeton, and of the bankruptcy, the bankrupt was indebted to the defendant in the sum of 48*l.* upon a bill of exchange drawn by one Eives upon and accepted by the bankrupt, payable to one Harland, and by Harland indorsed to the defendant: the plaintiffs replied that the bankrupt had accepted the bill for a debt due from him to Harland, and that, after the bill became due

and was dishonored, Harland indorsed it to the defendant without consideration, in order that the defendant might purchase the phaeton, setting off the amount of the bill, and then hand over the phaeton to Harland:—Held, on special demurrer, that the replication was a good answer to the claim of set-off.

THE declaration stated that heretofore, and before the commencement of the suit, and before Richardson became a bankrupt, to wit, on the 6th of May, 1837, in consideration that Richardson, before he became bankrupt, at the special instance and request of the defendant, would sell and deliver to the defendant a certain vehicle, to wit, a phaeton, and would before such delivery make certain additions therein suggested and required by the defendant, the defendant then undertook and faithfully promised Richardson to pay him for the said phaeton (such additions having been made as aforesaid), to wit, the sum of 48*l.*, in cash, on the delivery of the said phaeton: and the plaintiffs, assignees as aforesaid, averred that Richardson, confiding in the said promise and undertaking of the defendant, did afterwards and before the said Richardson became bankrupt, and between the day and year above mentioned and a certain other day, to wit, the 13th May, 1837, make the additions so suggested and required by the defendant as aforesaid, and afterwards, to wit, on the day and year last aforesaid, sell and deliver the said phaeton with such additions as aforesaid to the defendant on the terms aforesaid, and did then, on such delivery, request the defendant to pay the said Richardson the said sum of 48*l.* in cash: yet the defendant, not regarding his said promise and un-

dertaking so by him as aforesaid made, but contriving and intending to deceive and defraud the said Richardson before he became bankrupt, did not nor would, on such delivery as aforesaid, pay the said sum of 48*l.* in cash, or any part thereof, but then wholly neglected and refused so to do; nor did nor would at any time thence hitherto pay the same or any part thereof, either to the said Richardson before he became bankrupt, or to the plaintiffs, as assignees as aforesaid, or any of them, since the bankruptcy of the said Richardson; but the same was still wholly due and unpaid: to the damage of the plaintiffs as assignees as aforesaid of 100*l.* &c.

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The defendant pleaded—that, before and at the time of the said delivery of the said phaeton, and from thence until the time of the said bankruptcy of Richardson, the said Richardson was indebted to the defendant in the sum of 48*l.*, as indorsee of the bill thereafter mentioned, upon and by virtue of a certain bill of exchange in writing bearing date the 27th January, 1837, then, to wit, on the day and year last aforesaid, made and drawn by one John Eives before the said delivery of the said phaeton and before the said bankruptcy, and directed to the said Richardson, whereby the said John Eives required Richardson to pay to William Harland, or order, the said sum of 48*l.* at a certain period which had elapsed before the delivery of the said phaeton and before the said bankruptcy, to wit, two months after the date thereof, and by the said John Eives then, to wit, on the day and year last aforesaid, before the said delivery and before the said bankruptcy, delivered to the said William Harland, and by the said William Harland, then, to wit, on the day and year last aforesaid, before the delivery of the said phaeton and before the said bankruptcy, accepted, and by the said William Harland then, to wit, on the day and year last aforesaid, before the delivery of the said phaeton and before the said bankruptcy, indorsed to the defendant; which said sum of

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48*l.* in the said bill specified, from the time of the bankruptcy until and at the commencement of the suit, was and still is due and owing and unsatisfied to the defendant as such indorsee as aforesaid upon and by virtue of the said bill; which said sum of 48*l.* so due to the defendant equalled the full amount of the damages by the said Richardson before his bankruptcy, and by the plaintiffs, assignees as aforesaid, since the said bankruptcy, sustained by reason of the non-performance of the promise in the declaration mentioned: and the defendant was ready and willing and thereby offered to set off and allow to the plaintiffs, as such assignees as aforesaid, the said sum of 48*l.* so due and owing to the defendant, against the said damages, according to the form of the statute in such case made and provided—verification.

Replication.

To this plea the plaintiffs replied—that the said Richardson, before he became bankrupt, and before any of the times in the declaration mentioned, was indebted to one William Harland, and in consideration thereof had accepted the said bill of exchange in the second plea mentioned as therein alleged, and that, after the said bill of exchange had become due and dishonored, the said William Harland indorsed and delivered the same to the defendant without any consideration or value whatever for such indorsement or delivery, in order that the defendant might hold the same as trustee thereof for the said William Harland, and on the agreement, terms, and understanding that the defendant should purchase the said phaeton from the said Richardson on the terms in the declaration in that behalf mentioned, and afterwards hand over the said phaeton to the said William Harland, but, instead of such payment for the same as therein alleged to have been agreed upon between the said Richardson and the defendant, should fraudulently attempt to set off the amount of the said bill of exchange against the price of the said phaeton; and so the plaintiffs, assignees as afore-

said, said that the defendant was not at any of the times in the second plea mentioned the bonâ fide holder or indorsee of the said bill of exchange—verification.

The defendant demurred specially to this replication, assigning for causes—that the plaintiffs ought to have directly traversed the allegation contained in the plea, that Richardson was indebted to the defendant, and that the replication, if it meant any thing, amounted to an argumentative denial only of that allegation, and was bad for such argumentativeness—and that, if the replication admitted Richardson to have been indebted as stated in the plea, there was nothing upon the record to deprive the defendant of his right of set-off—and that the mere use of the word “fraudulently” amounted to nothing, unless the facts stated amounted to a fraud in law, which they did not, as Richardson voluntarily gave up his lien, which was his only protection against a set-off (68).

The plaintiff joined in demurrer (69).

Butt, in support of the demurrer.—That a set-off may be pleaded to an action of this sort, is clear from *Gibson v. Bell*, 1 New Cases, 743, 1 Scott, 712, and *Groom v. West*, 1 P. & D. 19, 8 Ad. & E. 758.

(68) One point marked for argument on the part of the defendant, was—That, where goods have been delivered, the price contracted to be paid for them is a debt; and the plaintiffs could not dispute the defendant's right to set off the amount of the bill, because it was admitted that Harland held the bill for value, and as it is immaterial to the acceptor, so far as his liability is concerned, on what terms a holder for value chooses to transfer a bill, Richardson became the defendant's debtor.

(69) The points marked for argument on the part of the plaintiffs were as follow :—

That the replication contained a good and sufficient answer to the second plea, inasmuch as the bill of exchange in the said second plea mentioned could not be legally set off, under the circumstances disclosed in the replication; and that the second plea was bad and insufficient in law, inasmuch as a set-off could not be pleaded to the cause of action alleged and set forth in the declaration.

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1. Plaintiff precluded by the form of the record from asserting fraud.

1. By the admission in the replication that the bill was accepted by Richardson for a bonâ fide debt due to Harland (whose indorsee the defendant is), the bankrupt and his assignees are precluded from raising any question as to the transaction between the defendant and Harland touching the bill. One of the first rules of law with regard to bills of exchange, is, that an acceptor for value is bound at all events to pay the bill, and that nothing short of payment or a release can relieve him from this responsibility which the law-merchant casts upon him—*Bayley on Bills*, 499, 500; *Fentum v. Pocock*, 5 Taunt. 192, 1 Marsh. 14 (overruling *Laxton v. Peat*, 2 Camp. 185); *Whitaker v. Edmunds*, 1 Ad. & E. 638, 1 M. & Rob. 366. Suppose the bill indorsed without consideration, and whilst it remains in the hands of the indorsee (as agent of the drawer), the drawer and acceptor enter into an agreement whereby the liability of the latter is released, and the agent afterwards sues upon the bill; undoubtedly a plea setting forth the circumstances would be a good answer to the action: but that is not the present case. The acceptor cannot inquire into what passes between the indorser and the indorsee. In *Johnson v. Kennion*, 2 Wils. 262, it was held, that, in an action by the indorsee against the drawer of a bill, though the indorser has paid part of the money to the indorsee, he may recover the whole sum in the bill against the drawer. [*Tindal*, C. J.—*Wilson*, J., in *Bacon v. Searles*, 1 H. Blac. 88, rather doubts the authority of that case.] It was recognized in *Reid v. Furnival*, 1 C. & M. 538.

2. Replication discloses no fraud in law.

2. But, assuming that it is still competent to the bankrupt or his assignees to impeach the transaction, the facts alleged in the replication do not amount to a fraud in law. The replication seems to have been framed upon the supposed authority of *Fair v. M'Iver*, 16 East, 130. There, third persons holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defend-

ants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months (before which time the trader's acceptance would be due), but without communicating to the trader that they were the holders of his acceptance: and it was held that the trader having become bankrupt, and his assignees having brought assumpsit to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance which they did not hold in their own right, but in effect for such other persons. The principles upon which that decision proceeded are somewhat obscure: and the case has a feature that materially distinguishes it from the present—the transaction was a fraud upon the general body of the creditors of the bankrupt. In *Eland v. Karr*, 1 East, 375, where a party upon a sale of goods had stipulated for ready money payment only, this was held to be satisfied by a payment made with his own bill. Speaking of this case, Lord Ellenborough says, in *Fair v. M'Iver*—"I defer to the authority, but am not convinced by it." In *Mayer v. Nias*, 8 Moore, 275, 1 Bing. 311, where the defendant ordered goods, to be paid for in ready money, and on being applied to for payment by the vendor's agent, tendered him a bill of exchange accepted by the vendor, and which had become due and was dishonored before the goods were ordered, and the agent at first refused to accept the bill in part payment, but afterwards took it to the vendor, who retained it: in an action of assumpsit by the assignees of the vendor, to recover the value of the goods, it was held, that, in the absence of any evidence of fraud, the delivery and retention of the bill were equivalent to payment. "In the case of *Fair v. M'Iver*," says Parke, J., "fraud was clearly established, as the defendants were not the real owners of the bill, but combined with those

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who were, for the purpose of setting it off as payment for goods which were to be paid for in another mode to the bankrupt, which should be available to him as cash, no communication being made to him that the defendants were the holders of his acceptance at the time. But, there appearing to be no evidence of fraud in this case, the decision in *Eland v. Karr* seems to me to be particularly applicable." The like was held in *Cornforth v. Rivett*, 2 M. & S. 510. So, in *Thorpe v. Thorpe*, 3 B. & Ad. 580, where A. remitted a bill of exchange to B., to be paid to a third person on A.'s account, and B. discounted the bill, but did not pay over the proceeds, it was held that B. might avail himself of a set-off in assumpsit brought against him by A. for money had and received. There was a direct breach of trust. These cases shew that a party may legally resort to any contrivance to obtain payment of a debt, provided there be no fraud upon other creditors. The plaintiff should have made it appear, as was done in *Fair v. M'Iver*, that bankruptcy was contemplated. In *Hawkins v. Whitten*, 5 M. & R. 219, 10 B. & C. 217, in an action by assignees of a bankrupt, it was held that the defendant was entitled, under the 6 Geo. 4, c. 16, s. 50, to set off a debt due to him from the bankrupt, if, when he gave credit to the bankrupt, he had no notice of a prior act of bankruptcy, though he had notice that the bankrupt had stopped payment. Bayley, J., there says: "Before this statute [6 Geo. 4, c. 16, s. 50,] passed, there were three provisions for setting off mutual debts and credits in cases of bankruptcy: one by the 5 Geo. 2, c. 30, s. 28, another by the 46 Geo. 3, c. 135, s. 3, and the third by the 5 Geo. 4, c. 98, s. 48. The first gave the right of set-off if the credits were given or the debts incurred at any time before the person became bankrupt, without any qualification. The second gave the right, notwithstanding the existence of a prior act of bankruptcy, in the same manner as if there had been no prior act of bankruptcy, provided the credit were given

to the bankrupt two calendar months before the date and suing out of the commission, or provided the person claiming the benefit of the set-off had not, at the time of giving such credit, notice of any prior act of bankruptcy committed by such bankrupt, or that he was insolvent, or had stopped payment. The 5 Geo. 4, which repeals the 5 Geo. 2 and the 46 Geo. 3, consolidates the two provisions which I have mentioned in those statutes, but, instead of the concluding provision in the 46 Geo. 3, excludes from the benefit of the set-off such persons only as had, when they gave credit to the bankrupt, notice, either actual or constructive, of an act of bankruptcy by the bankrupt committed, or that he had stopped payment; and the two provisions contained in the 46 Geo. 3 were in terms confined, as they probably would before have been confined in construction, to those cases in which there had been a prior act of bankruptcy. At the time, therefore, when the 6 Geo. 4 was passed, every man was entitled to the benefit of a set-off if the credit between him and the bankrupt were given, or the debt between them existed, before any act of bankruptcy had been committed; and he was also entitled, notwithstanding an act of bankruptcy, if the person claiming the set-off had not, when he gave his credit or trusted the bankrupt, notice of an act of bankruptcy by the bankrupt committed, or that he had stopped payment. The 6 Geo. 4 takes away the latter part of this qualification, namely, the notice that the bankrupt had stopped payment, and gives the right of set-off in all cases where it existed before any act of bankruptcy committed, and gives it also where there has been a prior act of bankruptcy, if the party claiming the set-off had no notice of the act of bankruptcy. Notice of insolvency, therefore, or notice of having stopped payment, are no longer ingredients upon this point. Notice of an act of bankruptcy is alone the criterion or dividing point; and before this period the defendant takes the notes he claims to set off, and thereby

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becomes a creditor of the bankrupts and makes them his debtors. It may be true, and we believe is, that he took the notes for the very purpose of making them the subject of his set-off, and of getting in substance twenty shillings in the pound upon them; but, as this is not prohibited by the statute, we cannot say that it is illegal." This is not a case of mutual credit, but of set-off, properly so called. Richardson was in point of law a debtor to the defendant. [*Tindal*, C. J., referred to *Harris v. Lunell*, 4 Moore, 10, 1 B. & B. 390. There, A. sold goods to B., to be paid for by a bill at two months, and, not being able to obtain the bill from B., and doubting his solvency, A. employed his broker to repurchase them in his own name, which was done, although at a great loss. B. afterwards became bankrupt, without knowing that the goods had been repurchased by the broker on account of A. In an action of trover by the assignees of B. against A. for the goods, it was held that they were not entitled to recover, the transaction not being fraudulent on the part of A.]

Plaintiff not
 precluded from
 shewing fraud.

Warren, contra.—*Hawkins v. Whitten*, *Harris v. Lunell*, and the other cases relied on for the defendant, might have been applicable if the action had been brought against Harland; for, as Buller, J., says, in *Hankey v. Smith*, 3 T. R. 507, n., "In order to constitute mutual credit, it is not necessary that the parties mean particularly to trust each other in that transaction: for, if a bill of exchange, which is accepted, be sent out into the world, credit is given to the acceptor by every person who takes the bill." And see *Collins v. Jones*, 10 B. & C. 777. But a claim of set-off rests upon a wholly different foundation. Lord Ellenborough's statement of *Fair v. M'Iver*, 16 East, 137, disposes of this case:—"Here it appears that the defendants had combined with Perry & Firmiston that a bill of Wilson's held by Perry & Firmiston, which they had con-

sidered to be a bill of depreciated credit and not likely to be paid, should be passed off against Wilson the acceptor in exchange for certain goods of his. And to conceal this purpose, Perry & Firmiston shift the bill into the hands of the defendants, who then apply to Wilson as indifferent customers for the purchase of the goods to be paid for by a bill (not *that* bill) at three months' date, or made equal to cash in three months, and which should be satisfactory to him. They held out to him a bill which should be available to him as cash. Wilson contemplated no fraud, and is not estopped or concluded by the medium of fraud of the defendants, nor by the terms of the contract, to claim payment for the goods against them. Therefore, even if he had continued solvent, and had brought the action in his own name, he would not have been concluded. Then, if the bill in question would have been no payment for the goods within the terms of the contract, how can it be a good payment by way of set-off? which involves a more difficult question, how far, supposing it could avail between the parties really interested, it could be set off by these defendants, who took the indorsement of it, not for themselves, but for Perry & Firmiston, and merely for the purpose of getting the bankrupt's goods without paying for them. Wilson was not justly and truly indebted to the defendants at the time of the sale; and though they might have brought an action against him on the bill, yet upon the statute [8 Geo. 2, c. 24, s. 5], by way of claim under the commission, they must have sworn that he was then justly and truly indebted to them upon the bill; which they could not have done for that purpose, as they held it merely as trustees for Perry & Firmiston." In *Mayer v. Nias* there was no fraud; neither was there in *Eland v. Karr*, *Cornforth v. Rivett*, *Harris v. Lunell*, or *Hawkins v. Whitten*. The principle of *Fair v. M'Iver* was recognized in *Key v. Flint*, 8 Taunt. 21, and in *Belcher v. Lloyd*, 10 Bing. 310, 3 M. & Scott, 822. A

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Fraud sufficiently alleged in the declaration.

party cannot avail himself of his own wrongful act as establishing a mutual credit within the statute. This, as was said by Parke, B., in *Thorpe v. Thorpe*, 3 B. & Ad. 585, speaking of *Buchanan v. Findlay*, 9 B. & C. 738, "was not a case of mutual credit, because the transaction on the part of the defendants was against good faith."

The record sufficiently discloses fraud. It is clearly a fraud to induce a man to part with goods on a contract which the purchaser does not intend to perform. In all the cases where the creditor has been permitted to resort to artifice, he has been acting on his own behalf, and not with a view to the protection of another.

Busby, in reply.—The transaction was not fraudulent in law, and the case is not to be distinguished from *Eland v. Karr*, *Buchanan v. Findlay*, and *Hawkins v. Whitten*.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—The question raised upon this record for our consideration, is, whether the facts stated in the replication are sufficient to shew that the defendant is not entitled to avail himself of the right to set off the acceptance of the bankrupt insisted upon by his plea. And we are of opinion that the facts stated in the replication shew that the case does not fall within the 50th section of the bankrupt act, 6 Geo. 4, c. 16, and that the set-off ought not to be allowed.

It may be true, as urged in argument on the part of the defendant, that Richardson, the bankrupt, being the acceptor of the bill for a valuable consideration, would not have been able, if he had remained solvent, to set up the want of consideration for the indorsement of the bill by Harland, the payee, either in answer to an action on the bill by Combes, the holder, or in reply to a plea of set-off. But the question in this case turns upon the clause in the

bankrupt act which gives the right of set-off; and we think, under the facts stated in the replication, there was no debt whatever between the bankrupt and the defendant arising out of the acceptance, within the meaning of that clause; but that the whole transaction as between Combes and Harland was a mere colour and contrivance to make it appear that the defendant was the real and bonâ fide holder of the bill at the time of the bankruptcy; whereas in truth he had no interest whatever in it, but held it only as agent of Harland, for the purpose of enabling the latter to receive 20s. in the pound upon the bill instead of coming in for a dividend under the fiat: for, the replication alleges that the bill of exchange was indorsed to and put into the hands of the defendant after it was due and dishonored, without any consideration whatever; and that the purpose and design of such indorsement and delivery to the defendant was, that he might hold it as trustee for Harland, on the understanding that the defendant should purchase the phaeton from Richardson, and afterwards hand it over to Harland, but, instead of paying for it in money, as agreed on by the contract, should attempt to set off the amount of the acceptance. Every step in the transaction, therefore, proceeded on fallacy and falsehood; it was an unreal transaction from beginning to end; and could never create a debt as against the creditors within the meaning of the statute, which must have intended a real bonâ fide debt. The present case appears to be stronger against the defendant than *Fair v. M'Iver*, 16 East, 130, inasmuch as it was not shewn in that case that M'Iver had taken the bankrupt's acceptance by any preconcert with the indorsers that he should purchase for their benefit, and set off the bill against the demand; but, for anything that appears to the contrary, the plan of setting off the bill was concocted between the defendant and the indorsers after the bill came into his hand. We think, therefore, the present case falls clearly within the principle laid down in

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Fair v. M'Iver, and must be governed by it; that there was no real bonâ fide debt due to the defendant, capable of being set off under the statute; and consequently that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

Monday,
 Nov. 25th.

It is not necessary in this court to indorse on a writ of ca. sa. the *addition* of the defendant: the rule of 2 & 3 Geo. 4, requiring such indorsement, applying only to the court of Queen's Bench.

BROWN v. HUDSON.

MANSELL obtained a rule nisi to set aside a writ of *capias ad satisfaciendum*, on the ground that the *addition* of the defendant was not indorsed thereon pursuant to the rule of Hilary Term, 2 & 3 Geo. 4, which provides "that the attorney concerned for the plaintiff in the cause, or his agent, shall, upon all bailable mesne process, and every writ of attachment, and fieri facias, and *capias ad satisfaciendum*, indorse the place of abode and *addition* of the party against whom the writ is issued, or such other description of him as such attorney or agent may be able to give."—See 5 B. & Ald. 560, 1 D. & R. 471.

Talfourd, Serjeant, shewed cause.—He submitted that the rule relied on obtained in the court of Queen's Bench only: and he produced an affidavit of the plaintiff's attorney averring his inability to give any description of the defendant.

Bompas, Serjeant, in support of the rule.—In *Davidson v. Dunne*, 4 Dowl. 119, where the court refused to discharge a defendant out of custody on a testatum ca. sa. on the ground of the want of an indorsement on the ca. sa. pursuant to the rule in question, it was assumed that the rule was adopted in practice in this court.

TINDAL, C. J.—In *Davidson v. Dunne* the parties came

to the court under an assumed state of the law. If the point had been brought fairly under our consideration, we should have said then, as we say now, that there is no such rule in this court.

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MAULE, J.—In Tidd's Forms, 8th edit., 352, the following appears in a note:—"In the Queen's Bench there is a rule (R. H. 2 & 3 Geo. 4, K. B.) 'that the plaintiff's attorney or agent shall, upon all bailable mesne process, and every writ of attachment, and fieri facias, and capias ad satisfaciendum, indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney or agent may be able to give.' In conformity with which rule, the above indorsement should be made on all writs of fieri facias and capias ad satisfaciendum issuing out of that court. *But the rule does not extend to the other courts*; and, as to bailable mesne process, it seems to be virtually repealed by the uniformity of process act." New Prac. 99, 100.

The rest of the court concurring—

Rule discharged, with costs.

HUNTLEY v. BULWER and Others.

THIS was an action of debt against the churchwardens and overseers of the poor of the parish of Ramsden Bellhouse, in the county of Essex, for the year 1835, to recover 74*l.* 7*s.* 6*d.*, the balance of a bill of costs incurred in the prosecution of an appeal against an order of removal.

The defendants pleaded—first, except as to 3*l.* 12*s.* 2*d.*, parcel &c., payment—secondly, as to all but 3*l.* 12*s.* 2*d.*,

Monday,
Nov. 18*th.*

An attorney employed to prosecute an appeal against an order for the removal of a pauper permitted the next sessions to pass without causing the appeal to be entered and respited, and

failed to comply with the directions of the 81st section of the 4 & 5 Will. 4, c. 76, as to the notice and statement of the grounds of appeal. The justices at a subsequent sessions having refused to entertain the appeal:—Held, that the plaintiff could not maintain an action for his costs.

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a set-off—thirdly, payment of the 3*l*. 12*s*. 2*d*. into court, and non damnificatus ultra.

The cause was tried before Tindal, C. J., at the adjourned sittings for London after Trinity Term, 1838. No evidence was given in support of the first and second pleas. The defence urged was, that, through the plaintiff's negligence and want of skill, the work and labour in respect of which the action was brought was wholly useless and unavailing to the defendants. The facts were as follow:—

On the 12th December, 1835, an order under the hands and seals of two magistrates of the county of Kent was made for the removal of a pauper named William Spurge from the parish of Holy Cross, Westgate, in Kent, to Ramsden Bellhouse, in Essex. On the 29th of the same month the defendants instructed the plaintiff to appeal against this order; and the plaintiff, looking at the order, observed, "You have just hit it"—meaning that there was just sufficient time for giving notice of appeal for the then next sessions. The plaintiff accordingly prepared a notice of appeal, and a statement of the grounds of appeal, and caused them to be served on the 31st. The next sessions holden for the county of Kent commenced at Canterbury on the 5th January, 1836, and were continued by adjournment at Maidstone on the 7th (70). But, in consequence of the notice of appeal not being given in time, and the statement of the grounds of appeal not complying

(70) It appeared in evidence that the county of Kent is divided (by a local arrangement, but not legally) into two districts, called the Eastern and Western divisions; that the sessions commence at Canterbury and at Maidstone alternately, opening at the one place and being continued by adjournment at the other; and that the sessions for January, 1836, com-

menced at Canterbury on the 5th, and were continued by adjournment at Maidstone on the 7th.

A similar local arrangement exists in Sussex—The King v. The Justices of Sussex, 7 T. R. 107—and in several other counties. But in Sussex the sessions are always held first in the Western, and afterwards adjourned into the Eastern division.

with the statute (71), the statute requiring it to be signed by the parish officers, and delivered *fourteen* days at the least before the first day of the sessions at which the appeal is intended to be tried, and the statement being delivered (*signed by the plaintiff*) only *six* days before the first day of the sessions, the appeal could not then be heard. The notice also appeared to have been given for the West Kent, instead of the East Kent sessions, in which latter division the respondent parish is situate. At Maidstone, the plaintiff, by consent of the attorney for the respondent parish, obtained leave then to enter the appeal, and respite it to the next sessions for the Eastern division of the county, to be held at Canterbury in the month of April following, on payment of 16*l.* costs. The following undertaking was thereupon given by the respondents' attorney :—

“ Ramsden Bellhouse, and Holy Cross, Westgate.

“ I hereby undertake, on the part of the churchwardens and overseers of the poor of the parish of Holy Cross, Westgate, in the county of Kent, to consent that the churchwardens and overseers of Ramsden Bellhouse, in the county of Essex, enter their appeal against the order of removal of William Spurge at the next General Quarter Sessions to be holden at St. Augustine's near Canterbury, and that no advantage be taken of the proceedings already adopted by the said churchwardens and overseers of the said parish of Ramsden Bellhouse.

“ Maidstone,

“ Thos. Thorpe De Lassaux.

“ 7th January, 1836.”

The appeal was not entered and respited at the January sessions. The parties attended at the Easter sessions at Canterbury, in April; and, it being objected by the counsel for the respondent parish that the appeal had not been entered and respited at the January sessions, and

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therefore the appellants were not in a situation to have it tried, the sessions held that they had no jurisdiction, and refused to entertain the appeal. Previously to his departure for Canterbury for the Easter sessions, the plaintiff obtained from the defendants an advance of 15*l.*, for which he gave credit in his bill.

On the part of the defendants, it was contended that the plaintiff's omission to enter and respite the appeal at the January sessions, and to give the notice and statement in the manner required by the statute, whereby the defendants had been prevented from having their appeal heard, was such gross negligence as to disentitle him to claim any reward for his labour. His lordship, inclining to this opinion, directed a nonsuit, reserving leave to the plaintiff to move to set it aside and enter a verdict in lieu thereof.

Wilde, Serjeant, in Michaelmas Term last, accordingly obtained a rule calling on the defendants to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff upon the issues joined on the first and second pleas, damages, 1*s.*; and upon the issue joined on the third plea for the sum of 70*l.* 14*s.* 5*d.*, or such other sum as the court should direct; or why a new trial should not be had.—To deprive an attorney of the price of his labour, it must be clearly shewn that its unproductiveness has resulted solely from gross negligence—*Templer v. M'Lachlan*, 2 New Rep. 136; *Johnson v. Alston*, 1 Camp. 176; *Dax v. Ward*, 1 Stark. 409; *Montrion v. Jefferys*, 2 C. & P. 113, R. & M. 317; *Edwards v. Cooper*, 3 C. & P. 277. Ignorance of the fact of the division of the county can hardly be said to be crassa negligentia in a stranger to the locality: nor can the plaintiff be said to have been guilty of gross negligence in proceeding to enter the appeal at the Easter sessions, upon the faith of the undertaking given by the attorney for the respondent parish. The circumstance of the statement of the grounds of ap

peal being signed by the plaintiff, and not by the parish officers, as required by the statute, was not adverted to at the sessions, and therefore did not contribute to the result of which the defendants complain. The plaintiff is, at all events, entitled to a verdict upon the first and second issues.

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F. Kelly and *James* shewed cause.—The plaintiff was properly nonsuited. His services having, by reason of the gross negligence and want of skill exhibited by him, become wholly unavailing to his clients, he was clearly entitled to no reward—*Hall* (or *Hill*) v. *Featherstonehaugh*, 5 M. & P. 541, 7 Bing. 569. The plaintiff ought, under the 9 Geo. 1, c. 7, s. 8, to have entered the appeal at the January sessions at Maidstone, and respited it to the April sessions at Canterbury. The omission to do this was gross negligence. And he was further guilty of gross negligence in not giving the notice and statement of the grounds of appeal, as required by the 81st section of the 4 & 5 Will. 4, c. 76 (72), as well as in not causing

(72) Which enacts, "that, in every case where notice of appeal against such order [the order of removal] shall be given, the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall, with such notice, or *fourteen days* at least before the first day of the sessions at which such appeal is intended to be tried*, send or deliver to the overseers of the re-

spondent parish a statement in writing under their hands of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid: Provided always, that it shall not be lawful for the respondent or appellant parish, on the hearing of any appeal, to go into or give evi-

* "This provision does not prevent an appeal being *entered* before such statement has been sent, nor does it affect the common law right of the sessions in any case to adjourn a *hear-*

ing at its discretion." Theobald's Poor Laws, Supp. p. 16. *The King v. Kimbolton*, 1 Nev. & P. 606, 6 Ad. & E. 360.

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the statement to be signed by the parish officers. Whatever the merits of the appeal, the defendants have a right to say, that they were deprived by the plaintiff's conduct of the opportunity of trying it.

Wilde, Serjeant, and *Hughes*, in support of the rule.—The question here is, not whether or not the sessions properly determined that they had no jurisdiction to entertain the appeal in April, but whether, the peculiar circumstances of the case being looked at, the plaintiff has been guilty of such a degree of negligence as to disable him from suing for his costs. Whether or not an appeal which is to be heard at Canterbury may be entered and respited at Maidstone, is at the best doubtful. Though held by adjournment, the two sessions are for all practical purposes distinct (73): and the plaintiff cannot be said to have been guilty of *crassa negligentia* for being ignorant of a division that does not prevail in his own county (*Essex*), and is not even in *Kent* sanctioned by any lawful authority. But, be the practice one way or the other, the respondents ought not to have been permitted to recede from an agreement for which they had received a price. [*Tindal*, C. J.—The appeal should have been entered and re-

dence of any other grounds of removal, or of appeal against any order of removal, than those set forth in such respective order, examination, or statement as aforesaid."

(73) "Where in a county in which there is but one commission of the peace, the sessions are held in two divisions, the Eastern and Western, for instance, the justices sitting first in one, and then by adjournment in the other; this adjournment sessions is considered as an original sessions with respect to the divi-

sion of the county for which it is held; so that, if the appeal is against an order made in that division, it may be entered at such adjournment; for, so far as respects all matters arising within the division where the sessions is held, such adjourned sessions is, to all intents and purposes, an original sessions, though not as to matters arising in the other division." *Theobald's Poor Laws*, 31—citing *The King v. The Justices of Suffolk*, 7 T. R. 107.

spited at Maidstone. That not having been done, the sessions at Canterbury had no authority under the statute to hear the appeal.] Rules of practice in all courts are permitted to bend to the private agreements of the parties. In *The King v. The Justices of Wiltshire*, 1 East, 683, where a father and son were removed from Westbury to North Bradley by two several orders of removal, and the parish officers of Westbury and North Bradley agreed that the settlement of the son should follow that of the father, without the expense of a separate appeal; in consequence of which an appeal was only entered against the order removing the father; and after the sessions had determined that the father was settled in Westbury, and had quashed that order, Westbury refused to take back the son: the court of King's Bench granted a mandamus to the sessions to receive and determine the appeal against the order removing the son, though at a subsequent sessions to that holden next after the order of removal made; saying—"The parish officers of North Bradley were prepared to enter their appeal at the proper time, and were only prevented from doing so by the agreement of the other parish, which then rendered it unnecessary. No fault was imputable to them. The mandamus therefore should go to the justices to receive and enter the appeal nunc pro tunc, and enter continuances." The sessions ought to have heard the appeal at Canterbury. In *The King v. The Justices of Essex*, 1 B. & Ald. 210, where an order of removal was served on the appellant parish on Saturday, and the sessions were holden on the following Tuesday, and the appellant parish was thirty-seven miles from the place where the sessions were holden, but there was no appeal to those sessions, and the justices refused to receive the appeal at the next sessions, the court granted a mandamus. "The statute 13 & 14 Car. 2, c. 12, s. 2," says Lord Ellenborough, "certainly directs the appeal to be at the *next* quarter sessions, but that must mean the next

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practicable sessions. The parish officers must have a reasonable time allowed them to make the necessary inquiries, that they may judge of the propriety of appealing or not. It has been said, that, although the appeal could not have been heard at those sessions, still that it ought to have been entered and respited: but that would only be incurring a useless expense, without conferring any benefit on either party, and was therefore quite unnecessary." [Maule, J. The appeal might have been entered and respited at the January sessions, according to the statute 9 Geo. 1, c. 7, s. 8, even though no notice had been given—*Rex v. The Justices of Huntingdonshire*, Cald. 283; *The King v. The Justices of Gloucestershire*, Doug. 191; *The King v. The Justices of Herefordshire*, 3 T. R. 504. The words of the statute (74) were, in *The King v. The Justices of Staffordshire*, 7 East, 549, held to be imperative.] An appeal cannot be entered and respited at one place, and heard at another—*The King v. The Justices of Sussex*, 7 T. R. 107.

TINDAL, C. J.—It is quite clear that the defendants have derived no benefit from the work and labour in respect of which the plaintiff has brought this action. That which they bargained for was that the propriety of the order for removing the pauper should be tried at the Quarter Sessions: and every step taken by the plaintiff shewed his utter ignorance of the proper course to be adopted for attaining that object. In the first place, the

(74) "That no appeal from any order of removal shall be proceeded upon in any court of Quarter Sessions, unless *reasonable notice* be given by the churchwardens or overseers of the poor of the parish or place who shall make such appeal, unto the overseers of the parish or place from which such poor person or persons shall be removable;

the *reasonableness* of which notice shall be determined by the *justices* of the peace of the Quarter Sessions to which the appeal is made; and if it shall appear to them that reasonable time of notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions, and then and there finally hear and determine the same."

notice of appeal was given for the sessions held at Maidstone, instead of for the Canterbury sessions, the respondent parish being situate within the Eastern division of the county; and it was a six instead of an eight days' notice. It seems clear, upon the authorities that have been cited, and the statute 9 Geo. 1, c. 7, s. 8, that, under these circumstances, the appellants could not insist upon having the appeal tried (75): but it was the plaintiff's duty, when he got to Maidstone, and found that he was wrong both as to the place and the time, to have entered the appeal there, and respited it over to the next sessions at Canterbury. I have not heard any observation in the course of the argument to shew that the local division of the county could have prevented him from doing this. But this not having been done, the agreement made with the attorney for the respondents was unavailing. When the parties went to Canterbury, the sessions refused to enter and hear the appeal: and, as far as I can see, they had clearly no authority to hear it. But, even if the appeal had been duly entered at Maidstone, and respited, there was still an objection to its being heard at Canterbury that is perfectly unanswerable. The statement of the grounds of appeal is required by the statute to be under the hands of the overseers or guardians of the appellant parish, and to be delivered to the overseers of the respondent parish fourteen days at least before the first day of the sessions at which the appeal is intended to be tried: whereas, neither was the statement delivered fourteen days before the first day of the sessions, nor was it signed by the overseers or guardians. When the plaintiff undertook the

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(75) Unless an appeal is properly adjourned, the ensuing sessions have no jurisdiction to hear and determine it; and it must appear on the caption of the order of sessions to have been regularly res-

pited by continuances or adjournment, or the court of King's Bench will quash the order as void. *Rex v. Hedingham*, Burr. S. C. 112; *Rex v. West Torrington*, Burr. S. C. 293.

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conduct of the appeal, it behoved him to make himself acquainted with all the steps necessary to carry it through. It seems to me that he has exhibited throughout a want of that fair degree of intelligence and professional skill which every attorney is bound to bring into the market, and therefore that he was not entitled to maintain this action.

BOSANQUET, J.—The question is whether the work and labour in respect of which this action is brought have not become wholly useless to the defendants by reason of the plaintiff's negligence and want of skill. I am of opinion that they have. It is not because a suit is unfruitful or a defence unsuccessful that the attorney who conducts it is to be deprived of his costs. But, what are the facts of this case? The order of removal was made on the 12th December, 1835. The next sessions were to be held at Canterbury on the 5th, and at Maidstone on the 7th January, 1836. These, therefore, were the next practicable sessions: but the appellant parish were not bound to try then; it was sufficient to have the appeal entered, and respited to the next Easter sessions. The plaintiff, on receiving his instructions on the 29th December, observes to the defendants, "You have just hit the time;" and so they had, for, though there was not then time to give the notices required to enable the appellants to go to trial at the January sessions, they were in time to have entered and respited the appeal, which, it seems, might be done either at Canterbury or at Maidstone. The plaintiff, however, omitted to get the appeal entered and respited at the January sessions: and when the parties came to Canterbury at Easter, the court very properly refused to hear the appeal, on the ground that it had not been duly entered and respited at the previous sessions. The plaintiff alleges that he was led into this error by the agreement he entered into with the respondents' attorney.

But, if he has thought fit to enter into an agreement that the appeal should be tried at a sessions that had no jurisdiction to hear it, how can that bind his clients? It is in fact a further evidence of his negligence and want of skill; for, the hearing of an appeal is not matter of discretion, it is regulated by statute. And, even supposing *this* did not prevent the appeal being heard at Easter, the plaintiff was guilty of two other acts of negligence, in not complying with the act of parliament, which he was bound to know the effect of, either of which would have led to the same result. The 81st section of the 4 & 5 Will. 4, c. 76, requires a statement of the grounds of appeal to be given to the overseers of the respondent parish fourteen days before the first day of the sessions at which the appeal is to be tried, and also requires such statement to be signed by the overseers or guardians of the appellant parish: and the plaintiff not only omitted to deliver the statement in time, but also omitted to cause it to be signed by the parish officers. No benefit, therefore, having resulted to the defendants from the plaintiff's services, by reason of his negligence, he is not entitled to recover.

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COLTMAN, J., was absent.

MAULE, J.—I am of the same opinion. The ground of defence is that the consideration for the defendants' alleged promise does not arise. The plaintiff sues for work and labour done by him for the defendants at their request. That which the defendants requested was, that the plaintiff would put them in the way of properly prosecuting an appeal against an order of removal. This the plaintiff has failed to do, in consequence of gross ignorance of the law upon the subject. He seems to have been totally ignorant of his own duties and of his clients' rights. Under the 9 Geo. 1, c. 7, s. 8, the defendants had a right to have the appeal entered at the January sessions and respited

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to the next Easter sessions—*The King v. The Justices of Staffordshire*, 7 East, 549. The plaintiff seems to have been ignorant of that very familiar law, as well as of the 81st section of the 4 & 5 Will. 4, c. 76, which provides, that, in every case where notice of appeal against an order of removal shall be given, the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall, with such notice, or *fourteen days* at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing *under their hands* of the grounds of such appeal; and that it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid. There could be no doubt or difficulty as to the construction of that clause: nothing could be less likely to mislead. In consequence of this double failure on the part of the plaintiff, the whole proceedings were futile. Instead of at once entering and respiting the appeal at the January sessions at Maidstone, the plaintiff purchased for 16*l.* that which the respondents had no power to grant, and which the appellants had a right to do, viz. enter and respite. I think the sessions rightly decided that they had no jurisdiction to hear the appeal at Easter. If they had assumed such jurisdiction, they would have been dealing improperly with the interests of third parishes. It seems to me, therefore, that, as the appeal was prevented from being heard in consequence of the negligence and want of skill of the plaintiff, in not complying with the plain directions of the statutes, there is no pretence for saying that his services have been of any avail to the defendants; and therefore he is not entitled to recover.

Verdict for the plaintiff on the first and second issues, with damages 1*s.* on each issue, and for the defendant on the third.

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WILLIAM KERR v. EDWARDS and Others, Assignees of
HALL KERR, a Bankrupt.

Thursday,
Nov. 14th.

THIS was an action of assumpsit for work and labour and materials, and money paid. The plaintiff's claim arose out of the following circumstances:—Messrs. Sunderland, Dolan, & Co., were contractors for the supply of clothing to the gentlemen cadets at the Royal Military Academy at Woolwich, and made sub-contracts with the bankrupt, Hall Kerr (the father of the plaintiff), who was a tailor at Woolwich, and others. The supplies were made periodically, pursuant to warrants issued from the War Office. One of these warrants required the contractors to furnish by the 31st August, 1838, a certain number of suits; and in pursuance thereof Hall Kerr undertook to make and deliver them. Hall Kerr having in part performed the contract, about the 3rd September, absconded; and the remainder of the clothes were made by the present plaintiff. In October, Sunderland, Dolan, & Co. received from government the amount of the contract—492*l.* 7*s.* 6*d.* A fiat issued against Hall Kerr on the 13th December, 1839, under which Edwards and others were appointed assignees. The plaintiff commenced an action against Sunderland, Dolan, & Co., for the amount of the work so done by him, claiming in his declaration and particulars 183*l.* and a fraction. Certain claims were also made upon the fund in the hands of Sunderland & Co. by (amongst others) the assignees of Hall Kerr. An order was made by Mr. Justice Coltman under the interpleader act, 1 & 2 Will. 4, c. 58, s. 1, directing the defendant in the above action (Dolan) to pay into court 516*l.* 12*s.*, to abide the event of an issue between the plaintiff and the assignees of Hall Kerr—to determine whether the plaintiff was entitled to the sum of 492*l.* 7*s.* 6*d.*, or any part thereof, out of the fund paid into court.

Upon an issue under the 1st section of the interpleader act the plaintiff claimed 183*l.* for work and labour &c., and recovered 50*l.* A judge at chambers having made an order directing that each party should pay his own costs of the cause and issue and of all applications and proceedings in and connected with the cause and issue—The court declined to interfere.

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The issue came on for trial before Tindal, C. J., at the last Summer Assizes at Croydon. The defence set up at the trial was that the plaintiff was in partnership with Hall Kerr, his father. The jury returned a verdict for the plaintiff—damages 50*l*.

The parties afterwards went before Mr. Justice Coltman at Chambers for an adjudication of the costs of the proceedings. That learned judge thereupon made the following order, on the 7th instant:—

“William Kerr v. John James Dolan.”

Order of Colt-
man, J.

“Upon reading my order made in this cause on the 28th March last, and upon hearing the attornies or agents for the plaintiff, also for the assignees of Hall Kerr, a bankrupt, in the said order named, and also for Messrs. Aldred & Lancaster, and the issue in the said order directed having been tried between the plaintiff and the said assignees, and the plaintiff having been thereupon found entitled to the sum of 50*l*., part of the sum of 492*l*. 7*s*. 6*d*. in the said order mentioned, out of the fund which has been paid into court in pursuance of the said order; I do order that the said sum of 50*l*. be paid out of court to the said plaintiff, or his attorney; that the sum of 25*l*. be paid out of court to Messrs. Aldred & Lancaster, or to their attorney; and that the residue of the fund now in court be paid out of court to the said assignees, or to their attorney: and I do further order that each of the said parties do respectively bear and pay his and their own costs and charges of this cause, of the said issue, and of the several applications, and all proceedings in and connected with the cause and issue: and I further order that all proceedings in this cause and issue be stayed, and that the claims of all parties be barred.”

Cowan, for the plaintiff, now moved that this order might be set aside.—He submitted, that, though the sta-

tute impowered the court or judge to make such rules and orders as to costs and all other matters as might appear to be just and reasonable, yet the courts had uniformly awarded costs to the party who was successful on the trial of the issue—*Duear v. Mackintosh*, 3 M. & Scott, 174 (76). [Tindal, C. J.—The plaintiff by his action demanded too much.] The costs of an action depend, not upon the proportion the verdict bears to the sum claimed, but upon the finding of the jury upon the issue presented to them. If the original action had been allowed to proceed, and had been attended with the same result, the plaintiff would as a matter of right have had his costs. Why should he be placed in a worse position by the virtual substitution of a new action against his will? The plaintiff was compelled to bring his action.

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TINDAL, C. J.—I think we ought not to disturb my Brother Coltman's order, unless satisfied, that, in exercising the discretion given him by the statute, he has manifestly come to an erroneous conclusion. Under the particular circumstances of the case, I cannot say that he has done so. Here was a sum of money the subject of conflicting claims: each party grasped at more than he was entitled to; both therefore were wrong. Suppose the matter had been referred to an arbitrator, who was to deal with the costs at his discretion; could we say that he had exercised an unsound discretion, if, finding that the plaintiff was entitled to something, but considerably short of the amount he claimed, he directed, as this order directs, that each party should bear his own costs? Clearly not. How, then, can we say that the learned judge has taken an erroneous view of the justice of the case by doing the same thing?

(76) See *Pitches v. Edney*, 6 7 Dowl. 319; *Reeves v. Barraud*, Scott, 582, 4 New Cases, 720; 7 Scott, 281.
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BOSANQUET, J.—All the circumstances of the case considered, I am clearly of opinion that the discretionary power over the costs, vested by the statute in the court or the judge making the order, has been properly exercised.

MAULE, J. (77)—I am also of opinion that the order of my Brother Coltman was both reasonable and just. The plaintiff succeeded in establishing his claim for work and labour to an extent short of a third of the sum demanded by his particulars. If the learned judge had allowed him his costs, I think the defendants would have had good reason to complain.

Rule refused (78).

(77) Coltman, J., was present, but said nothing.

(78) But see *Staley v. Bedwell*, 2 P. & D. 309. There, an issue was directed under the interpleader act between the claimant and execution-creditor, the costs of the issue to abide the order of the court. The claimant claimed *the whole* of the goods seized, but proved his right to *part* only. And the court held that he was entitled, notwithstanding, to the general costs of the issue, as if he had been plaintiff in trover, and also to the costs of the original and subsequent application to the

court. "If," said Little Dale, J., "the claimant had succeeded in trover, he would have been entitled to the general costs. The only consequence of his claiming too much in such an action would have been, that the execution-creditor might have applied to pay money into court, in which case the claimant would have gone on at his peril. The claimant, then, is to have his general costs of the issues and of the applications."

This case was decided in the last Easter Term, but not reported until after the determination of this court in *Kerr v. Edwards*.

Saturday,
 Nov. 23rd.

The plaintiff having undertaken not to sign judgment

until a four days' further demand of plea, the defendant (no plea having been demanded) pleaded two pleas without a rule to plead double, and ruled the plaintiff to reply; whereupon the plaintiff signed judgment:—Held, that the judgment was regular.

GOULD v. WHITEHEAD.

THE defendant being sued as the indorser of a bill of exchange, his attorney on the 28th June last informed the

attorney for the plaintiff that the indorsement supposed to have been made by the defendant was forged. The latter requested time to make inquiry upon the subject, and gave the defendant's attorney an undertaking that he would not sign judgment until after a four days' further demand of plea. On the 2nd November, the defendant, without waiting for a demand of plea, and without obtaining the leave of the court, pleaded two pleas—first, that he did not indorse the bill—secondly, non assumpsit—and on the 9th ruled the plaintiff to reply. On the 13th, the plaintiff, treating the pleas as a nullity (79), signed judgment.

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Henderson, on the 16th, obtained a rule nisi to set aside the judgment for irregularity.—He submitted, that, though the second plea was a nullity, the first was a good plea, and the plaintiff ought not to have signed judgment—*Vere v. Goldsborough*, 1 Scott, 265, 1 New Cases, 353; and that his so doing was in violation of good faith. There was an affidavit of merits.

Fitzherbert shewed cause.—The delivery of a plea is a waiver of a demand of plea—*Lockhart v. Mackreth*, 5 T. R. 661; *Perry v. Fisher*, 6 East, 549; *Bond v. Smart*, 1 Chitt. 735 (80): and a rule to reply is equally a waiver of a demand of plea. The plaintiff therefore was clearly entitled to sign judgment, the pleas having been pleaded without a rule to plead several matters—*Tidd's Practice*, 9th edit. 566-7. Besides, the motion addresses itself to a supposed irregularity; and a violation of good faith is not an irregularity—*Smith v. Clarke*, 2 Dowl. 218.

Henderson, in support of his rule.—The plaintiff has

(79) Reg. Gen., Hilary Term, 2 Will. 4, c. 34.

(80) And of a rule to plead, but not of material irregularities in the previous proceedings of the plain-

tiff, and does not admit the declaration to be well delivered. Per Bayley, B., in *Gray v. Swing*, Price's P. C. 35.

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signed judgment in violation of his express undertaking that he would not do so until after a four days' further demand of plea. Undoubtedly, for some purposes of practice, a demand of plea may be waived by the delivery of a plea: but it is new to say that the delivery of a plea deprives the party of the right to insist upon the performance of an express undertaking. In *Warne v. Beresford*, 4 Dowl. 361, a judgment signed (after a defective plea delivered) as for want of a plea, there having been no rule to plead, was held irregular. "The plaintiff," says Parke, B., "has treated the defendant's plea as a nullity, as if there was no plea; and if there had been no plea at all, the judgment would clearly have been irregular for want of a rule to plead." So, here, if the pleas were a nullity, the rule to reply was a nullity also. Taunton, J., in *Garratt v. Hooper*, 1 Dowl. 28, says: "If the plea is a nullity, I apprehend the plaintiff is under no obligation to reply; and the rule to reply to a nullity he was not bound to act upon."

TINDAL, C. J.—It appears to me that the judgment in this case has been regularly signed. The defendant has, in violation of the rule, put in two pleas without having obtained leave for that purpose. The plaintiff, therefore, was entitled to treat the pleas so pleaded as a nullity, and to sign judgment. The question then is, whether in signing judgment the plaintiff has been guilty of a breach of faith. He undertook not to sign judgment without a four days' further demand of plea. But the defendant, without waiting for a demand of plea, voluntarily pleads, and rules the plaintiff to reply. That surely absolved the plaintiff from his undertaking: for, if the plaintiff had not signed judgment as he did, the defendant would have signed judgment against him for not replying (81). I

(81) *Garratt v. Hooper*, 1 Dowl. 28, seems to be an authority to shew that a judgment so signed would have been irregular.

think it does not lie in the defendant's mouth to say that the rule to reply was a void rule. There has been no violation of good faith on the plaintiff's part. As, however, the defendant swears to merits, the rule will be absolute on payment of costs.

The rest of the court concurring—

Rule accordingly.

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v.
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BROOK v. GUNNING.

THE defendant was on the 1st November instant arrested upon a writ of capias issued at the suit of the plaintiff by virtue of an order of Coltman, J., pursuant to the 1 & 2 Vict., c. 110, and was at the same time served with a writ of summons (82). He deposited the sum indorsed on the writ, together with 10*l.* for costs, with the officer, under the provisions of the statute 43 Geo. 3, c. 46, s. 2 (83). On

Monday,
Nov. 25th.

The defendant was arrested on the 1st November by virtue of a writ of capias issued pursuant to the 1 & 2 Vict., c. 110, s. 3; he thereupon deposited with the officer the sum indorsed on the writ, and 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2; on the 8th he put in special bail to the action; on the 13th, one of the bail being excepted to, the defendant rendered:—Held, that the putting in bail sufficiently brought the defendant into court to enable him to move to have the money paid out of court to him, notwithstanding no appearance had been entered; and that the render was in time.

(82) "All personal actions in her majesty's superior courts of law at Westminster shall be commenced by writ of summons." 1 & 2 Vict., c. 110, s. 2.

(83) By the 4th section of the 1 & 2 Vict., c. 110, it is enacted, "that the sheriff or other officer to whom any such writ of capias [issued under the authority of s. 3] shall be directed, shall, within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon; and such defendant, when so arrested, shall

remain in custody until he shall have given a bail-bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of capias, together with 10*l.* for costs, according to the present practice of the said superior courts; and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into court instead of putting in and perfecting special bail, shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit."

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the 8th he *put in* special bail, one of whom was excepted to on the 13th, on which day the defendant rendered himself.

R. Thomas, on a former day, on the part of the defendant, obtained a rule calling on the plaintiff to shew cause why the money paid into court should not be paid out to him.

Carrington shewed cause.—The defendant has not appeared to the writ of summons, and therefore is not properly before the court. And the render was too late: the defendant should have rendered within the eight days allowed by the statute (Schedule, No. 1) for his appearance (84). In *Newman v. Hodgson*, 2 B. & Adol. 442, 1 Dowl. 329, it was held, that, where money has been deposited in lieu of bail, and paid into court pursuant to the statute 43 Geo. 3, c. 46, and the defendant does not *perfect* bail in time, the plaintiff will be allowed, on motion, to take the money out of court, though the defendant has rendered himself into custody since the time for putting in bail, if there be no affidavit of merits. Here there is no affidavit of merits. And in *Geach v. Coppin*, 3 Dowl. 74, which was an application on the part of the defendant to have the money deposited under the statute paid out to him, he having put in and perfected special bail, *but not in time*—Littledale, J., after consulting the other judges, and after time taken to consider, says: "This was a rule obtained by the defendant, the object of which was that he might be at liberty to take out of court a sum of money paid in together with 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2. That statute directs that the money may be taken out of court by a defendant, *if he shall put in and perfect bail according to the course and practice of the court.* The courts, whenever this money has been

(84) See *Grant v. Gibbs*, 1 Scott, 390.

paid in, have exercised a discretionary power over it when the defendant has not put in and perfected special bail in due time. They sometimes extend the time of putting in bail, under the circumstances of the case, whether upon an affidavit of merits or otherwise (85); and, if the plaintiff applies to obtain it out of court, they will see whether there is any reasonable ground of objection to the application, on the part of the defendant: and they have also permitted the defendant to apply a portion of the money in satisfaction of part of the plaintiff's demand, assimilating it to paying money into court (86). But this rule comes before the court upon the mere naked point whether, the defendant having put in bail after the time, he is, as a matter of right, entitled to have this money out of court. I think, upon looking at the facts, that, not having performed the conditions contained in the act of parliament, he is not." The defendant should at least have sworn to merits: and the mere act of *putting in* bail, which results in nothing, cannot avail the defendant. The render was clearly out of time.

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Thomas, in support of his rule.—To entitle the defendant to make this motion, it is not necessary that he should have appeared to the writ of summons. [*Tindal*, C. J.—Is the defendant in court? The writ of *capias* is not a continuance of the writ of summons, but a mere authority to detain the defendant in custody.] By putting in bail the defendant sufficiently brings himself into court. *Harford v. Harris*, 4 Taunt. 669, is precisely in point: it was there held, that, if a defendant, who pays the debt and 10*l.* costs to the sheriff in lieu of bail, under the 43 Geo. 3, c. 46, puts in bail above, who, being excepted to, render

(85) See *Parker v. Turner*, 2 Chitt. Rep. 71. Heneage, 4 M. & Scott, 472, 10 Bing. 561, 2 Dowl. 806, and *Balls*

(86) See *Hubbard v. Wilkinson*, 3 B. & C. 496. But see *Stultz v.* *v. Stafford*, 2 Scott, 426, 4 Dowl. 327.

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 {
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 v.
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him instead of justifying, the plaintiff is not entitled to receive out of court, under s. 2, the money so deposited; but the defendant may in such case receive back his deposit. That case was acted upon in *Chadwick v. Battye*, 3 M. & S. 283, where Lord Ellenborough says: "The defendant has gone one step further than if he had put in and perfected bail; for, he has rendered in discharge of his bail. To refuse this motion would be converting that which was intended in ease of the party into an instrument of vexation." In *Rowe v. Softly*, 4 M. & P. 464, 6 Bing. 634, the defendant, on his arrest, deposited in the hands of the sheriff the amount of the debt, and 10*l.* for costs, in pursuance of the statute 43 Geo. 3, c. 46. s. 2, the time for *putting in* special bail expired on the 14th May, the time for *perfecting* on the 18th; and it was held that the defendant had until the latter day to avail himself of the provision of the 7 & 8 Geo. 4, c. 71, s. 2, by making an additional deposit of 10*l.* in lieu of special bail. So, here, the defendant had four days to render after the bail had been excepted to. In *Geach v. Coppin*, the defendant was clearly out of time: the arrest took place on the 29th August, and bail was not perfected until the 30th September.

TINDAL, C. J.—It appears to me that the first objection that has been urged on the part of the plaintiff—that the defendant is not entitled to take the money out of court, inasmuch as he has not appeared to the writ of summons—may be answered by reference to the form of the writ of *capias* given in the schedule to the 1 & 2 Vict., c. 110:—"We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take C. D., if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law, in an action on promises, &c., at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody: and

we do further command you, that, on execution hereof, you do deliver a copy hereof to the said C. D. : And we hereby require the said C. D. to take notice that within eight days after the execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our court of ——— to the said action, and that, in default of so doing, such proceedings may be had and taken as are mentioned in the warning written or indorsed hereon," &c. Now, the defendant did "cause special bail to be put in for him to the action." It is true he did not perfect bail: but he rendered. It seems to me that the putting in bail was for this purpose equivalent to an appearance; and that the case of *Harford v. Harris* must govern the present.

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The rest of the court concurring—

Rule absolute (87).

(87) See *Reynolds v. Wedd*, 6 Scott, 699, 4 New Cases, 694, 6 Dowl. 728.

THE LONDON AND BRIGHTON RAILWAY COMPANY v. WILSON.

THE SAME v. FAIRCLOUGH.

Friday,
Nov. 22nd.

THESE were actions of debt brought by the directors of the London and Brighton Railway Company, to recover By a railway-act it was provided, that, in any action to be brought by the company against any proprietor of any shares in the undertaking, to recover money due for calls, it should be sufficient for the company to declare that the defendant, being a proprietor of a share, or so many shares, was indebted to the company in so much as the calls in arrear should amount to, for a call, or so many calls &c., without setting forth the special matter; and that, on the trial, it should only be necessary to prove that the defendant at the time of making the calls was a proprietor of such share or shares as the action was brought in respect of, and that such notice was given as was directed by the act of such call or calls having been made, &c.; the clause then went on to define the requisite proof of proprietorship. In an action for calls, the court allowed the defendant to plead—that he was never indebted, and that he was not a proprietor—but refused to allow him also to plead—that notice of the making of the calls was not given in the manner required by the act—that no time or place was appointed for payment of the calls—that the calls were made to defray the expense of unauthorized deviations—and that, at the time the calls were made, there were not in the company the number of shares directed by the act.

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 Declaration.

from the defendants calls due upon certain shares in the undertaking held by them.

The declaration in either case stated, that whereas the defendant heretofore, to wit, on the 1st January, 1839, he then being a proprietor of divers, to wit, [seventy-seven] shares in a certain undertaking mentioned in a certain act of parliament (88) made and passed at a session of parliament held at Westminster in the First year of the reign of her Majesty Queen Victoria, intituled 'An Act for making a railway from the London and Croydon railway to Brighton, with branches to Shoreham, Newhaven and Lewes,' that is to say a certain undertaking for making and maintaining the said railway and other the works in that behalf, and for other the purposes declared and mentioned in the said act of parliament, was and is indebted to the said company in a large sum of money, to wit, the sum of 462*l.*, for and in respect of divers, to wit, two calls of the sum of 3*l.* each, upon each of the said shares so belonging to the defendant as aforesaid; whereby, and by virtue of the said act of parliament, an action hath accrued to the said company to demand and have of and from the said defendant the said sum of 462*l.*, being the sum above demanded: Yet the defendant, although often requested, hath not paid the said sum of 462*l.* above demanded, or any part thereof, but hath hitherto refused and still doth refuse to pay the same: to the damage of the said company of 100*l.*, and therefore they bring suit, &c.

Wilson's action.

In the action against Wilson, application was made to Erskine, J., at Chambers, for leave to plead the following pleas:—1. Never indebted. 2. *That the defendant was not proprietor of the shares in the declaration mentioned.* 3. That twenty-one days' notice was not given of the said calls, or of any of them, in manner in and by the act in that behalf required and directed. 4. That the directors

respectively making the calls did not appoint any time or times, place or places, for the payment of the said calls, or any of them, or any manner in which the same, or any of them, should be paid, or any person or persons to whom the same or any of them should be paid—verification. 5. That the said calls and each and every of them were and was respectively made, not for defraying the expenses of and of carrying on the said undertaking, and were not, nor was any of them, necessary for the same, but were and each of them was made for other and different purposes, and for purposes not authorized by the act—verification.

The learned judge allowed the first and second pleas, but declined to allow the rest.

Crompton, for the defendant, obtained a rule nisi to add the third, fourth, and fifth.

In Fairclough's action, leave was given to plead the following pleas:—1. Never indebted. 2. That the defendant was not a proprietor. 3. *That there were not at the time of making any or either of the said calls, in the said company or the capital thereof thirty-six thousand shares, as directed by the act of parliament, but a less number only, to wit, thirty-five thousand.*

Cowling, on a former day in this term, obtained a rule nisi to add other two, which the learned judge had disallowed, to the effect that certain deviations had been made in the construction of the railway, not warranted by the act, and that the calls were made to defray the expense of such deviations.

Wilde, Serjeant, for the plaintiffs, obtained rules nisi—in Wilson's action, to strike out the *second* plea—and in Fairclough's, to strike out the *third*.

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Wilde, Serjeant, and *Swann*, now shewed cause against the rules obtained by the defendants, and supported those obtained by the plaintiffs. — The act of parliament incorporating the company—7 Will. 4 & 1 Vict., c. cxix—impowers them to declare generally in actions for calls—s. 148 (89); intending to give them every possible facility in the re-

(89) Which enacts—"That, in any action to be brought by the said company against any proprietor of any share in the said undertaking, to recover any money due and payable to the said company for or by reason of any call made by virtue of this act, it shall be sufficient for the said company to declare and allege, that the defendant, being the proprietor of a share, or so many shares (as the case may be), in the said undertaking, is indebted to the said company in such sum of money as the call or calls in arrear shall amount to, for a call, or so many calls, of such sum or sums of money, upon a share or so many shares, belonging to the said defendant, whereby an action hath accrued to the said company by virtue of this act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of such share or shares in the said undertaking as such action is brought in respect of, or some one such share, and that such notice was given as is directed by this act of such call or calls having been made, without proving the appointment of the directors who made such call or calls, or any other matter whatsoever; and the said company shall

thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, on such call or calls, unless it shall appear that the principal monies previously paid on any such share, together with such call, exceeded the sum of 50*l.* on each share of that amount, or that any such call exceeded 10*l.* for each such share, and so in proportion for any less share, or was made payable before the expiration of three calendar months from the day appointed for the payment of the last preceding call, or that calls amounting to more than 25*l.* in the whole had been made in some one year on a share of 50*l.* and so in proportion for a share of less amount; and, in order to prove that the defendant was a proprietor of such share or shares in the said undertaking as alleged, the production of the books in which the said company is by this act directed to enter and keep respectively the names and additions of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to, and an account of the names of the several corporations, and of the names and places of abode of the several persons who shall from time to time be entitled to shares in the said undertaking, shall be prima

covery of calls (90). Under this section, it will be incumbent on the plaintiffs to prove that the defendants were, at the time of the making of the calls in respect of which the actions are brought, respectively proprietors of the shares mentioned in the declaration: the second plea therefore is wholly unnecessary. To entitle them to maintain the action, the plaintiffs must also prove that due notice of the calls was given pursuant to the 146th section (91):

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Wilson's pleas:
Second plea.
Third and
Fourth pleas.

facie evidence that such defendant is a proprietor, and of the number and amount of his shares therein: Provided always, that nothing herein contained shall extend or be construed to extend to charge or make liable any person or persons, bodies politic or corporate, who are or shall be proprietor or proprietors of the shares of the said company, or his, her, or their real or personal estate, with any debt or demand whatsoever due or to become due from the said company, beyond the extent of his, her, or their share or shares in the said company, any law, custom, or usage to the contrary thereof in any wise notwithstanding."

This clause very closely resembles the 84th section of the 6 Will. 4, c. xxix, the act incorporating the Southampton Dock Company, which was very elaborately considered in this court in the case of *The Southampton Dock Company v. Richards*, 1 Scott's New Rep. 219.

(90) See *The Southampton Dock Co. v. Richards and Others*, 1 Scott's New Rep. 219.

(91) "Which enacts—"That the said directors shall have power from time to time to make such calls of money from the subscribers to and

proprietors of shares in the said undertaking, to defray the expenses of and carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made or principal money paid for or in respect of any such shares, shall not amount to more than the sum of 50*l.* on any share of that amount, and so that no such call shall exceed the sum of 10*l.* upon each such share, which any person or corporation shall be possessed of or entitled unto in the said undertaking, and that the total amount of such calls in any one year shall not exceed 25*l.* upon each such share, and so in proportion for all shares of less amount, and so that an interval of three calendar months at the least shall always elapse between the day appointed for payment of one call and the day appointed for payment of the next succeeding call, and twenty-one days' notice at the least shall be given of every such call, by advertisement inserted in one or more London newspaper or newspapers, and in one or more Brighton newspaper or newspapers; and all monies so called for shall be paid to such persons and in such manner as in such notice shall be appointed; and the

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the third and fourth pleas therefore are equally unnecessary, raising no point that is not as well presented without them. [*Tindal*, C. J., suggested that the plaintiffs might consent that the matters intended to be given in evidence under these two pleas should be proved under the

respective owners of shares in the said undertaking shall pay their rateable proportion of the monies to be called for as aforesaid, to such persons and at such times and places as shall be appointed as aforesaid; and, if any owner of any such share shall not so pay such his rateable proportion, then and in such case, and as often as the same shall happen, such owners shall pay interest for the same, after the rate of 5l. per centum per annum, from the day appointed for the payment thereof up to the time when the same shall be actually paid; and, if any owner of any such share shall neglect or refuse so to pay such his rateable proportion, together with the interest, if any, which shall accrue for the same, then, or at any time thereafter, it shall be lawful for the said company to sue for and recover the same in any of her majesty's courts of record, by action of debt or on the case, or by bill, suit, or information, or the said directors may, and they are hereby authorized to declare the shares belonging to any person or corporation so refusing or neglecting to pay any such calls, together with interest, in manner last aforesaid, to be forfeited, and to order the same to be sold subject to the provisions of this act: Provided, nevertheless, that no advantage shall be taken of any forfeiture of any

share in the said undertaking, until notice in writing, under the hand of two directors, or the secretary or clerk of the said company, of such share having been declared by the directors forfeited, shall have been given or sent by the post unto or delivered to some inmate of the last or usual known place of abode of the owner of such share, or, in the case of a corporation, of the clerk of such corporation, nor until the declaration of forfeiture of the said directors shall have been confirmed either at a general or special general meeting of the said company, held after the expiration of three calendar months at the least from the day on which such notice of forfeiture shall have been given as aforesaid; and, after such declaration of forfeiture shall have been confirmed by such general meeting or special general meeting, the said company by an order to be made at the same or any subsequent general meeting, or special general meeting, shall have power to order the said directors to dispose of the shares so forfeited, or any of them, in manner by this act directed; and the said directors may in that case sell and dispose of such shares at a public auction or by private contract, and together or in lots, or in such other manner, and for such price as they may think fit; and a declaration,

first plea. To this *Wilde* assented.] The fifth plea is clearly an improper one: it is calculated to bring all the acts of the directors (past, present, and future), whose powers are defined by the 184th section (92), into question in the most inconvenient way. The courts of equity are

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pursuant to the said act of the sixth year of his late majesty's reign [5 & 6 Will. 4, c. 62], made by some credible person not interested, before any justice of the peace, or before any Master or Master extraordinary in the high court of Chancery, stating that such call had been made by the said directors, and that such notice had been given, and that such default in payment had been made in respect of the share so sold, and that the same share had been declared to be forfeited, and that such declaration had been confirmed in manner hereinbefore mentioned, shall be sufficient evidence of the facts therein stated; and the purchaser of such share shall not be bound to see to the application of his purchase-money, nor shall his title to such share be affected by any irregularity of proceeding in reference to such sale, but such declaration and the receipt of the treasurer or any two directors of the said company, for the price of such share shall be sufficient evidence of title thereto for all purposes whatsoever."

(92) Which enacts—"That the directors for the time being of the said company shall superintend all the affairs thereof, and have the custody of the common seal of the said company, with powers to use the same on their behalf, and shall

have full power and authority to do all acts whatsoever for carrying into effect the purposes of this act, and for the management, regulation, and direction of the affairs of the said company, or relative thereto, which the said company are by this act authorized to do, except such as are herein required and directed to be done at some general or special general meeting of the said company; and the said directors shall appoint and displace all the officers and servants of the said company, and allow to them such salaries, gratuities, or recompenses as to the said directors shall seem proper; and the said directors shall have authority to meet and adjourn from time to time, and from place to place, as they shall think proper; and there shall be three directors at the least present in order to constitute a meeting; and all questions, matters, and things which shall be discussed or considered at any meeting of the directors shall be finally determined by the majority of votes then present; and no director shall have more than one vote at any such meeting, except the chairman of such meeting, who, in case of an equal division, shall have a second or casting vote as such chairman; and the said directors shall keep a regular minute and entry of their proceedings at every meeting

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the proper tribunals to control the application of the funds of the company: or the shareholders may call meetings pursuant to the 172nd section (93).

The 3rd plea, in Fairclough's action, as to the non-existence of the proper number of shares, is only calcu-

of the said directors, and from time to time make report thereof to the half-yearly general meeting and to the special general meeting of the said company (if required by any of such meetings), and shall obey their orders and directions; and the said directors shall also keep full and true accounts of all monies disbursed and payments made by the said directors and by all persons employed by or under them, and of all money which they shall receive on behalf of or in respect of such undertaking from any collector of the rates, tolls, or sums by this act granted, or from any other officer employed in or having any concern, dealing, or transaction with the said undertaking, or from any other person on any account for the use of the said company, and shall regularly enter in some books to be from time to time provided at the expense of the said company for that purpose, notes, minutes, or copies, as the case may require, of such appointments, receipts, and disbursements, and of all contracts and bargains entered into or made by them, and of other their orders and proceedings, and which books shall be deposited with and kept under the care and direction of the said directors: Provided always that it shall not be lawful for the said directors to fix or order what remuneration shall be allowed to the di-

rectors of the said company: Provided also that the said directors shall and they are hereby required to take sufficient security from every person who shall be appointed treasurer of the said company, and from every receiver, collector, or officer of the said company who shall have the custody or control of any money received by virtue of this act, for the faithful execution of his office, before he shall enter thereupon."

(93) Which enacts—"That fifty or more proprietors of the said company, holding in the aggregate 2000 shares of 50*l.* each, or their equivalent in less shares, or upwards, in the said undertaking, upon which all calls actually previously made shall have been paid and satisfied, may at any time, whether before or after the first general meeting, by writing under their hands left at the office of the said company, or given to at least three directors of the said company, or left at or delivered to some inmate of their last or usual places of abode, require the directors of the said company to call a special general meeting of the proprietors of the said company, to be held in London; so as such requisition fully express the object for which such special general meeting is required to be called; and in case of neglect or refusal of the said directors to call such meeting for the

lated to embarrass the plaintiffs, and to raise a question which it is not competent to the defendants to raise. And as to the fourth and fifth, the question as to deviation cannot arise as between the company and individual shareholders: the 6th section (94), has reference only to the rights of those through whose lands the projected line is to run.

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Crompton (for the defendant Wilson) submitted that calls made for any purpose other than the act of parliament warranted, clearly could not be enforced, and that the defendant was entitled to have the notices upon the record.

space of twenty-one days next after such notice given as aforesaid, the same may be called by such fifty or more proprietors by giving fourteen days' notice thereof in one or more London newspaper or newspapers, and in one or more Brighton newspaper or newspapers; and the said company are hereby authorized to meet in pursuance of such notice, and such of the proprietors thereof as shall be present at such meeting personally or by proxy, shall proceed to the execution of the powers by this act given to the said company, with reference to the matters so specified in such notice; and all acts of the major part in votes of the proprietors of the said company so present at any such special general meeting, shall be as valid with respect to the matters specified in such notice as if the same had been done at a general meeting held at the time herebefore appointed for holding the same."

(94) Which enacts—"That the

said company, in making the said railway and other works by this act authorized, shall have full power and authority to deviate from the line delineated on the maps or plans so deposited and to be deposited with the clerks of the peace as aforesaid: Provided always that no such deviation shall extend to a greater distance than one hundred yards, and, in passing through any city or town, such deviation shall not extend to a greater distance than ten yards from the line so delineated upon the said plans, nor shall such deviation extend into the lands or property of any person whose name is not mentioned in the said book of reference, without the previous consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner herein provided for in cases of unintentional errors in the said book of reference."

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Cowling (for the defendant Fairclough).—The plea of deviation is warranted by the decision of the court of Queen's Bench in the late case of *The Queen v. The Eastern Counties Railway Company*, 2 P. & D. 648. There, a company empowered by statute (1 & 2 Vict. c. lxxxii) to make a railway from London to Norwich and Yarmouth, passing through Colchester, and required to set out any deviations from the parliamentary plan before the 27th July, 1839, and to make their compulsory purchases of land before the 27th July, 1840, had for two or three years proceeded with great activity to complete the line as far as Colchester, but on the 6th May, 1839, had not commenced proceedings for carrying on the line below Colchester. This course was approved of by the shareholders at large, and the funds of the company were nearly exhausted; but it appearing doubtful whether the company had any bonâ fide intention of completing the entire line, the court, at the instance of a small portion of shareholders, and a few landholders on the line, made absolute a rule for a mandamus to the company to set out their deviations, and make their purchases below Colchester. Lord Denman, in delivering the judgment of the court, says: "There is no higher duty cast upon this court than to exercise a vigilant control over persons entrusted with large and extensive powers for public purposes, and to enforce, within reasonable bounds, the exercise of such powers, in compliance with such purposes; and the more so, as we are not aware of any other efficient remedy. The principles upon which these powers are conferred by the legislature upon undertakers of this description, are now so fully understood that it is not needful to do more than generally to refer to them. They are thus laid down by Lord Eldon, in the well-known case of *Blakemore v. The Glamorganshire Canal Company*, 1 Myl. & K. 154: 'I apprehend those who come for these acts of parliament do in effect undertake that they shall do and submit to

whatever the legislature empowers and compels them to do; and that they shall do nothing else; that they shall do and forbear all that they are thereby required to do and forbear, *as well with reference to the interests of the public, as to the interest of individuals.*' The same doctrine was acted upon by this court in its fullest extent in the case of *The King v. Cumberworth*, 3 B. & Ad. 108. It remains only to add that these cases and principles have been recently recognized by the court of Exchequer in the case of *Lee v. Milner*, 2 M. & Welsby, 824." So, here we ought not to be precluded from shewing upon the record that the company have broken the condition upon which we subscribed. The question is one of far too much importance to be satisfactorily disposed of upon a motion of this sort.

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TINDAL, C. J.—When called upon to exercise a discretion as to the allowance or disallowance of pleas that are proposed to be pleaded, it behoves us to see with what powers the statute 4 Anne, c. 16, has armed us. Where the pleas are not calculated to meet the real justice of the case, but tend to useless expense, the soundest exercise of discretion is not to permit them to be put upon the record. This is the principle that was acted upon in a case of some notoriety in this court—*Gully v. The Bishop of Exeter*, 5 Bing. 42, 2 M. & P. 105. The question therefore is, whether, regard being had to the statute of Anne, the pleas suggested are such as we ought to allow. It appears to me that none of those that were disallowed by my Brother Erskine ought to be placed upon the record. With respect to the third and fourth pleas which the defendant Wilson desires to plead, they are simply unnecessary, inasmuch as the matter they seek to put in issue must necessarily be proved as part of the plaintiffs' case (95).

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(95) This remark would equally apply to the *second* plea in each action: see s. 148, note (89), ante, p. 350.

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The third plea proposed is, that twenty-one days' notice of the making of the calls was not given, as required by the act; and the fourth is, that no time or place was appointed by the directors at which the calls were to be paid. Now, the 148th section expressly declares, that, in any action to be brought by the company against any proprietor to recover any money due to them for or by reason of any call, "it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of such share or shares in the said undertaking as such action is brought in respect of, or some one such share, and that such notice was given as is directed by the act of such call or calls having been made," &c. This provision throws upon the plaintiffs the burthen of proving at the trial those two facts; for, though the words used are in the negative, they necessarily imply a direct affirmative, that the plaintiffs' proof shall go to that extent. And the plea of never indebted clearly calls upon the plaintiffs to prove that they have complied with those conditions precedent the proof of which is imposed upon them by the act. The fifth plea is that the calls for which the action is brought were made for purposes not warranted by the act. With what degree of justice could such a plea be allowed? In the first place, the subject-matter would be extremely difficult of proof at the trial: for, who can tell what were the intentions of the directors at the time of making the calls? Nor is it material what their intention was at the time. The act makes the unpaid calls a debt due from the subscriber to the company, and limits the answer to be given to such claim:—"And the said company shall thereupon be entitled to recover what shall appear due, including interest, on such call or calls, unless it shall appear that the principal monies previously paid on any such shares, together with such calls, exceeded the sum of 50*l.* on each share of that amount, or that any such call exceeded 10*l.* for each such share, and so on in pro-

portion for any less share, or was made payable before the expiration of three calendar months from the day appointed for the payment of the last preceding call, or that calls amounting to more than 25*l.* in the whole had been made in some one year on a share of 50*l.*, and so in proportion for a share of less amount." If we were to permit this plea to be placed upon the record, we should in effect be pro tanto repealing these provisions of the 148th section, which thus declare that the sums due for calls shall be recoverable by the company upon certain defined proof being given by them. This being a debt created by the act of parliament, it is clear that it was never intended, that, in calling upon a court of law to decide whether the calls are due or not, the parties should litigate matters that more properly belong to another forum. If the subscribers are dissatisfied with the manner in which the funds of the company are applied, the course pursued by the directors may be called in question at the general meetings; or a certain number of shareholders may, on giving twenty-one days' notice, call a special general meeting for the purpose. I think it is unreasonable, and never could have been intended, that so general a question, affecting the very existence of the company, should be litigated in an action against an individual subscriber for calls.

With respect to Fairclough's pleas—the third is, in effect, that fewer shares had been issued by the directors than the act of parliament directs. Let us see on what foundation this objection stands. The 136th section (96)

(96) Which, after reciting that, "Whereas the probable expense of making the railway and other works hereby authorized, will amount to the sum of 1,800,000*l.*, and sums exceeding that amount have been subscribed under the subscription contracts relating to

the several projected lines of railway before mentioned; and whereas it has been agreed between the parties promoting the said several lines that the said sum of 1,800,000*l.* shall be contributed by them in the proportions following, viz., 550,000*l.* by the parties promoting

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enacts, that, "notwithstanding anything in the several subscription deeds or contracts relating to the said several lines contained, the capital of the company thereby incorporated shall be 1,800,000*l.*, divided into 36,000 shares." I do not see how it is possible to say that there are not the proper number of shares. They may not all be afloat: but they are not the less in contemplation of law existing. It seems to me that this is in effect a plea that there is no company existing at all, and ought not to be allowed.—The remaining pleas are, that certain deviations were made, not warranted by the act, and that the calls were made to defray the expense of such deviations. If such a plea were to be available, the effect would be, that, in the event of the most trifling deviation in any part of the line, with the consent of the owner of the soil, every subscriber might refuse to pay any more calls, and the whole concern

the first-mentioned of the said lines; 330,000*l.* by the parties promoting the second-mentioned thereof; 270,000*l.* by the parties promoting the third-mentioned thereof; 100,000*l.* by the parties promoting the fourth-mentioned thereof; and 550,000*l.* by the parties promoting the last-mentioned thereof"—enacts—"that, notwithstanding anything in the several subscription deeds or contracts relating to the said several lines contained, the capital of the company hereby incorporated shall be 1,800,000*l.*, divided into 36,000 shares of 50*l.* each; and such shares shall as soon as conveniently may be after the passing of this act be apportioned and divided to and amongst the several provisional committees or provisional directors named in the said several subscription deeds or contracts, or the subscribers' agreements of even date

therewith, in the proportions hereinbefore mentioned; and shall by such provisional committees or provisional directors respectively be allotted among the several subscribers of the said before-mentioned five lines of railway, in proportion to the amount of their respective subscriptions; subject to the payment to each provisional committee or board of directors by every such subscriber of a like proportion of all costs, charges, and expenses incurred before the 13th day of June, 1837, in respect of any application to parliament for authorizing the execution of his respective projected line, or in anywise relating thereto; such payment to be made before any share can be required to be finally appropriated and registered as belonging to the subscriber as the holder thereof," &c.

would be broken up: a proposition so monstrous that it cannot be for a moment entertained. All the proposed pleas seem to me to be calculated rather to raise difficulties in the way of the plaintiffs, than to put forth any just grounds of defence.

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BOSANQUET, J.—I am also of opinion that the pleas by these rules sought to be pleaded ought not to be allowed to appear upon the record with the first and second. The pleas proposed are in substance—that due notice of the making of the calls was not given—that no time or place was appointed for the payment of the calls—that the calls were made for purposes not authorized by the act—that there was not in the company at the time of making the calls the number of shares required by the act—and that the calls were made to defray the expense of unauthorized deviations. It appears to me that none of these pleas ought to be allowed. By the 148th section of their act of incorporation, the company are empowered to declare generally:—"In any action to be brought by the said company against any proprietor of any share in the said undertaking, to recover any money due and payable to the company for or by reason of any call made by virtue of this act, it shall be sufficient for the said company to declare and allege that the defendant, being the proprietor of a share, or so many shares (as the case may be), in the said undertaking, is indebted to the said company in such sum of money as the call or calls in arrear shall amount to, for a call, or so many calls, of such sum or sums of money upon a share, or so many shares, belonging to the said defendant, whereby an action hath accrued to the said company, by virtue of this act, without setting forth the special matter." The clause then goes on to declare what proof shall be required to be given by the company:—"On the trial of such action, it shall only be necessary to prove that the defendant, at the time of making such re-

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spective calls, was a proprietor of such share or shares in the said undertaking as such action is brought in respect of, or some one such share, *and that such notice was given as is directed by this act of such call or calls having been made*, without proving the appointment of the directors who made such call or calls, or any other matter whatsoever; and the said company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, on such call or calls, unless it shall appear that the principal monies previously paid on any such share, together with such call, exceeded the sum of 50*l.* on each share of that amount, or that any such call exceeded 10*l.* for each such share, and so in proportion for any less share, or was made payable before the expiration of three calendar months from the day appointed for the payment of the last preceding call, or that calls amounting to more than 25*l.* in the whole had been made in some one year on a share of 50*l.*, and so in proportion for a share of less amount." It cannot, therefore, be necessary for the defendants to put on the record a plea denying that the notices required by the act were duly given.—The next question is, whether the defendant ought to be allowed to plead that there were not in the company the number of shares required by the act to form the capital of the company. The act of parliament has created the 36,000 shares: if the whole are not disposed of, the residue remain in the company. Independently of that, I am of opinion, upon the proper construction of the 148th section, that it is not competent to the defendants to set up such a defence.—The same observation applies to the plea of deviations. If the arguments urged on the part of the defendants were well founded, an action for calls might be defeated by a plea shewing the smallest possible act improperly done by the company.

MAULE, J.—I am also of opinion that Fairclough's

third plea should be struck out, and that the additional pleas sought to be pleaded by both defendants should be disallowed. It is not absolutely necessary to determine whether the proposed pleas are good or not: the parties may ascertain that by electing to rely upon any one of them. It appears to me that the first two of these pleas are altogether unnecessary, seeing that that which is sought to be put in issue by them is matter that must at the outset be proved by the plaintiffs; and that the remaining pleas are such as the act of parliament clearly intended to exclude. If defences of this sort were to avail, no public undertaking of the description in question could ever be carried into execution. It appears to me that they are clearly contrary to the policy as well as the express terms of the act of parliament.

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The plaintiff's rule to strike out Fairclough's *third* plea—absolute: the other rules discharged.

THE QUEEN v. THE SHERIFF OF ESSEX, in a Cause of
DORRIEN and Others v. SHERIDAN.

Monday,
Nov. 25th.

A WRIT of testatum fi. fa., indorsed to levy 148*l.* 10*s.*, was issued on the 2nd August last. A levy was made on the 3rd, at Stratford, which produced only 44*l.* 5*s.* 6*d.* The sale took place on the 12th on: the 13th September following, the defendant died. On the 4th September, the sheriff was ruled to return the writ: the return, however, was not made until the 1st November. On the 6th November an attachment issued against the sheriff.

On the 3rd August, the sheriff levied under a writ of fi. fa. On the 4th September, he was ruled to return the writ in eight days. On the day after the expiration of this rule the defendant died. The writ was not returned until the 1st November:—The court set aside, on payment of costs, sustained injury

Bompas, Serjeant, upon an affidavit, that, upon being served with the order to return the writ, the under-sheriff

an attachment against the sheriff, it not appearing that the plaintiff could have been

by the officer's neglect.

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wrote to the deputy-bailiff for the necessary information, but did not receive it in time to make the return before the 1st November, obtained a rule nisi to set aside the attachment; against which—

Wilde, Serjeant, shewed cause on a former day in this term.—The affidavit upon which this rule was obtained does not contain the least suggestion of excuse for not returning the writ. The effect of the sheriff's omission to do so was, to deprive the plaintiff of the opportunity of levying the residue of his debt (97); for, the plaintiff could not issue an alias until after the return of the testatum fi. fa. It will probably be contended on the other side, that the further writ must be tested after the return of the executed writ, and that, inasmuch as the defendant here died before the sheriff was bound to return the testatum, the plaintiff could not have sued out an alias. But that is not so: neither the teste nor the return of the testatum would appear upon the alias, which writ would merely recite the fact of the testatum having been returned "at a day now past." And *Sutton v. Lord Cardross*, 1 Dowl. 511, *Storr v. Bowles*, 1 Dowl. 516, and *Watson v. Maskell*, 4 M. & Scott, 461, are authorities to shew that the exact day of the issuing of the writ is immaterial, provided it do not on the face of it appear to have issued after the death of the defendant, and provided it is warranted by the judgment. And in *Brocher v. Pond*, 2 Dowl. 472, it was held that a fi. fa. on a judgment signed after a defendant's death, in vacation, may be tested on the last day of the preceding term, notwithstanding the 3 & 4 Will. 4, c. 67, s. 2: and Parke, J., said: "The act of parliament says 'all writs of execution *may* be tested on the day which the

(97) He produced an affidavit which stated that property of the defendant sufficient to satisfy the execution, had been removed by

the defendant's widow into the county of Middlesex, in the month of October.

same are issued.' It does not say they *must* be tested on that day: nor does it say how long before they may be tested. The execution-creditor has, therefore, a right to avail himself of his common law right." [*Bosanquet*, J.—It would seem from the form in *Tidd's Appendix*, 8th edit., 381, that the date must appear where the previous writ has been executed by a partial levy. *Tindal*, C. J.—No doubt, if the plaintiff could have issued a new writ tested before the death of the defendant, it would have bound the property.] The sheriff stands in the situation of the representatives.

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Bompas, Serjeant, in support of his rule.—The plaintiff has sustained no injury by the course that has been adopted. The sheriff clearly cannot be responsible for any consequences accruing after the day on which the defendant died. The plaintiff could not then have sued out any new writ that would have been available. The first writ must be returned before the second is issued; for, the return of the first must be recited in the second writ: and the statute 3 & 4 Will. 4, c. 67, s. 2, has no operation. The plaintiff, it is true, might, if there had been no partial levy, have proceeded under the old law, and issued a new writ tested as of the preceding term; or he might under the new practice have issued his writ tested of the day on which it was sued out. But, there having here been a levy of part of the debt, he could not have sued out a writ tested of the preceding term, and reciting the levy under the writ issued on the 2nd August; for that would have made it incongruous and absurd upon the face of it. If, therefore, no second writ could have issued until after the 13th September, the plaintiff has sustained no injury; and consequently the rule for setting aside the attachment must be made absolute upon the usual terms.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court:—

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This was a rule for an attachment against the sheriff of Essex for not returning a writ of testatum fi. fa. The facts were these:—The writ issued on the 2nd August, and was delivered to the sheriff on the 3rd, on which day a levy was made. On the 12th a sale took place, the proceeds of which satisfied only a part of the debt. On the 18th September, the defendant died. On the 4th September, the sheriff was required by a judge's order to return the writ in eight days. The return, however, was not made until the 1st November. The sheriff, therefore, was clearly in contempt: and the only question is whether and on what terms the attachment that has issued against him shall be set aside. On the part of the plaintiff, it is urged that he has, in consequence of the neglect of the sheriff to make the return in proper time, lost the opportunity of recovering the remainder of his debt, which it is said he might have done by issuing a fresh writ. If it were made clear to us that such was the necessary effect of the sheriff's conduct, we should place him in the same situation he would be in for disobedience of a rule or order to return mesne process. But we are not satisfied that any fresh writ could have been issued that would have had the operation contended for: and, at all events, as the first writ was not returned until the 1st November, there was nothing to prevent the plaintiff from going on with his execution, and seizing any other goods of the defendant he might obtain intelligence of, until his debt was fully satisfied; for, the writ in the new form is not returnable until it is actually returned. We therefore think that the justice of the case will be answered by making the rule absolute, on payment by the sheriff of all the costs that have been incurred upon the attachment: and we hope this will operate as a salutary warning to him, for he has certainly been guilty of a gross breach of duty, without the least shadow of excuse.

Rule absolute accordingly.

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Nov. 25th.*

In the Matter of HARE, MILNE, and HASWELL.

A RULE was obtained in this case on the part of Hare, calling upon Milne to shew cause why the award made between the parties should not be set aside, on two grounds—first, that Mackillop, one of the arbitrators, had drawn cases, and taken the opinion of barristers, and used them in the reference, without the previous knowledge or sanction of the two other arbitrators, and altogether without the concurrence of Hare, the statements in which were objected to by Mr. Turnbull, one of the arbitrators—secondly, that the reference proceeded and the award was made after the death of G. Haswell, one of the parties to the arbitration, and without his personal representative being made party to or having notice of the proceedings, and against the objection and protest of Hare.

It appeared from the condition of the bond of arbitration, and the affidavits which were filed, that Milne & Haswell were merchants in Batavia, the partner Milne residing in London, and conducting the partnership business there, and Haswell in Batavia; that Hare was a merchant in London having had large dealings with Milne & Haswell; and that, in the course of such business, disputes arose respecting certain mercantile transactions; whereupon all matters in difference were referred to Campbell, an arbitrator appointed by Milne, to Turnbull, an arbitrator appointed by Hare, and to Mackillop, a third person nominated by the two before they entered upon their arbitration. The arbitration proceeded, being conducted by Milne, the resident partner in England, on behalf of himself and Haswell, and by Hare on his own account, there

Milne and Haswell, merchants, and copartners, agreed to submit to arbitration all matters in difference between them and one Hare; the submission containing a provision, that, in case of the death of either party before the making of the award, the award should be delivered to the personal representatives of the party dying, or such of them as should desire the same. Haswell died on the 3rd July, 1838. Several meetings were held by the arbitrators between that day and the 3rd November, when Hare for the first time protested against their proceeding unless Haswell's executors were made parties. The award was made in March, 1839, the personal representative of Haswell not having been made a party to the reference:—The court refused to

set aside the award.

The court refused to set aside an award made by two of three arbitrators, upon a suggestion by the third that the award had been influenced by the opinion of counsel taken by the others upon a case inaccurately stated: the two arbitrators swearing that the case was not inaccurately stated, and that their minds had been made up as to the award before the opinion was taken.

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being an express clause in the submission, that no legal persons should be brought before the arbitrators; and the award was made in favour of Milne, and signed by two only out of the three arbitrators, viz. Campbell and Mackillop.

The submission bore date the 3rd August, 1837, and contained a provision, that, in case of the death of either party before the making of the award, the award should be delivered to the personal representatives of the party dying, or such of them as should desire the same. Haswell died on the 3rd July, 1838. On the 3rd November following, Hare protested against the arbitrators' proceeding unless the executors of Haswell were made a party; but several meetings had been holden by the arbitrators between the 3rd July and the 3rd November. The award was published in March, 1839.

F. Kelly and Martin, in Trinity Term, shewed cause.— They produced an affidavit of Mackillop, stating, amongst other things, that he had formed his opinion upon the point in dispute before the opinion of counsel was taken by him; that such opinion was taken for no other purpose than to guide his determination as to whether or not he should accede to the request of Turnbull, that the facts relating to the disputed points should be set out upon the award, having intended, in case such opinion differed from his own, to accede to the request of Turnbull, and to state the facts on the award; that it was not until that period that he read the cases and opinions mentioned in Turnbull's affidavit; and that the cases produced by him were not stated inaccurately, nor did they contain irrelevant matter introduced in a manner calculated to mislead counsel, or to produce an opinion by which the arbitrators could not be rightly governed; but that, on the contrary, they contained a fair and true statement of the circumstances. And also an affidavit of Campbell, whence it appeared that

his judgment was formed and delivered before either of the said cases or opinions were read by Mackillop, or read or seen by himself.—The application is answered in fact. There can be nothing objectionable in an arbitrator privately consulting counsel with a view to satisfying his own conscience.—Haswell died on the 3rd July; but it was not until the 3rd November that Hare objected to the arbitrators' proceeding in the absence of Haswell's personal representatives, several meetings having in the meantime been held. The objection therefore came too late. In *Hewlett v. Laycock*, 2 C. & P. 574, it was held, that, where a cause is referred to arbitration, the mode of conducting it must be left to the arbitrators; and if they, after the first or second meeting, exclude both the parties and their attorneys, and examine witnesses privately, at their (the witnesses') houses, such conduct is no good ground of objection, provided it does not proceed from corrupt motives; and that, at all events, if either party would take advantage of it, he must give notice at the time that he intends to rely on it as an objection; and that, if he lie by, and suffer other meetings to take place, and, when the arbitrators are ready to make their award, revokes his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award. Here, the arbitrators had no authority to make an award to bind the personal representatives of the deceased partner: the survivor was the proper person to go on with the reference. *Edmunds v. Cox*, 2 Chitt. 432, 3 Dougl. 406, 2 Tidd's Practice, 9th edit. 877, is an authority to shew that it was not competent to the arbitrators to make an award directly binding on the executors of Haswell.

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Wilde, Serjeant, and *R. V. Richards*, in support of the rule.—The circumstance of one of the arbitrators having behind the back of the others obtained opinions of counsel, is of itself sufficient to render the award bad. [*Vaughan*, J.

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It is sworn that the opinion of the arbitrator was written before the opinions of counsel were taken, and was not altered afterwards.] Important steps in the reference were taken after the opinions were obtained. The court will not encourage the making of affidavits like that of Mackillop—a practice that was strongly reprobated by Lord Eldon in *Walker v. Frobisher*, 6 Ves. 70. It is said that Hare waived the objection to the further proceedings under the submission in the absence of Haswell's personal representative. But, though matters of form may be waived, that which goes to the foundation of the party's right cannot be waived. By the terms of the submission, on the death of one of the parties, his personal representative was to be treated as a party to the reference. An award, therefore, made without due notice to the representative cannot be permitted to stand. When Haswell died, Milne ceased to represent him so as to bind his estate in equity: and, they not having been heard before the arbitrators, neither are the personal representatives of Haswell bound in equity by the award. The fact of the award being in favour of Hare does not cure the objection of want of mutuality. *Hewlett v. Laycock* can hardly be correctly reported. There, the submission was revoked before the making of the award; and the action seems to have been brought to recover the expenses incurred by the plaintiff in consequence of such improper revocation by the defendant.

Cur. adv. vult.

TINDAL, C. J., after stating the facts ut ante, p. 367, 8, delivered the judgment of the court as follows:—The first objection made against the award, as it was argued before us, was, in substance, that Mackillop took the opinion of counsel upon an incorrect state of facts, against the consent of Hare, and acted upon such opinion. If this objection had remained unanswered in point of fact, we should

have thought the award impeachable upon ground so clear and manifest that it is sufficient barely to state the proposition. But we think this objection satisfactorily removed by the statements in the affidavits in support of the award. The affidavit of Mr. Mackillop denies the statements in Mr. Turnbull's affidavit in several important points, and states in distinct terms that he had made up his own opinion on the point in dispute before the opinion of counsel was taken by him; and that such opinion was taken for no other purpose than to guide his determination whether he should accede or not to the request of Mr. Turnbull that the facts relating to the disputed points should be set out on the award; having intended, in case such opinion differed from his own, to accede to the request of Mr. Turnbull, and to state the facts on the award. And he further states that it was not until that period that he read the cases and opinions mentioned in Mr. Turnbull's affidavit, and that the cases produced by him were not stated inaccurately, nor did they contain irrelevant matter introduced in a manner calculated to mislead counsel, or to produce an opinion by which the arbitrator could not be rightly governed; but that, on the contrary, they contained a fair and true statement of the circumstances. And, again, it appears from the affidavit of Mr. Campbell, that his judgment was formed and delivered before either of the said cases or opinions were read by Mackillop, or read or seen by himself. With such contradiction as to part of the facts, and such explanation as to others, we do not feel ourselves warranted in yielding to the first ground of objection to the award.

As to the second objection, it appears that Haswell died in July, before the award was made, and that, after his death, several meetings took place before the arbitrators, but that, subsequently, and before the award was made, Hare protested against the further proceedings under the submission, without the appearance of the personal repre-

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representative of Haswell. There is in the bond of submission a provision, that, in case of the death of either party before the making of the award, then the award shall be delivered to their personal representatives, or such of them as shall desire the same. And, as a general proposition of law, it is extremely questionable whether the death of one of the parties on one side avoids an award—see the cases referred to in *Watson on Awards*, p. 27. We therefore think we should not be justified in setting the award aside, upon motion, on this objection. If, upon moving to enforce it by attachment, it could be made to appear to us that the party called upon to perform the award incurred any danger or lost any benefit by reason of the personal representative of the deceased partner not having been brought before the arbitrators; in such case terms and conditions might be imposed, calculated to remove such danger or inconvenience; or the party might be left to his remedy by action on the award. But, in the case before us, where the award is made in favour of the surviving partner, we see no possible difficulty on that ground. So that, at all events, the objection appears to us not sufficient for setting aside the award. We therefore think the rule must be discharged.

Rule discharged.

Saturday,
 Nov. 9th.

HOWELL v. BRODIE.

The defendant
 advanced money to one W.
 with the

THIS was an action of assumpsit for work and labour and materials. Plea, non assumpsit.

avowed intention of becoming interested jointly with him in a market which W. was in the course of erecting. The defendant was consulted by W. upon every occasion during the progress of the work; but no definite share in the concern was allotted to him, nor was there any express contract between him and W. as to a partnership, until the 15th October, 1833, when an agreement was entered into between them, to the effect that the market should be valued by a surveyor, and that the defendant should be interested in a seventh share. Profits had been made of the market prior to the date of the agreement, but had not been accounted for to the defendant; nor had he received any interest upon the sums advanced by him:—Held, that the defendant was not a partner until the 15th October, 1833, and consequently was not responsible to the builder for work done before that day.

The cause was tried before Tindal, C. J., at the sittings at Westminster after Trinity Term, 1838. It appeared, that, in the year 1829, one Wilson, who contemplated the erection of a market in the parish of Mary-le-bone, to be called the Portman Market, employed the defendant, a conveyancer, to draw a bill to be presented to parliament for authorizing and regulating the market. The defendant, after a few conferences upon the subject, expressed a desire to take some share in the concern. What passed upon these occasions was detailed in an examination of Wilson (who was about to quit England), under a judge's order. The more material parts of Wilson's statements on this examination were the following :—

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"A conversation took place between me and Mr. Brodie as to what I supposed the market would cost : I told Mr. Brodie that I thought what we then proposed to do would cost about 6,000*l*. He did not then make any proposal as to taking any share." "My impression is that it afterwards passed in words between us that Mr. Brodie was to take the half of such a thing as would cost 6,000*l*." "In the first instance, it was only intended to have a pitching market, such as are found in the continental cities. In that case the paving would have been the chief expense. Perhaps some stands would have been furnished by the sellers. That was communicated to Mr. Brodie. It was on that idea he proposed to take a half at 6,000*l*." "In order to induce the hay salesmen to come to the Portman Market, it was necessary to erect covered hay-sheds. They were erected, and were very expensive." "I conferred with Mr. Brodie as to the increase of expense : it led to an alteration as to Mr. Brodie taking the half. From that moment I gave up the idea of his taking half. I did not at that time propose to him taking any other share." "No distinct proposal was made as to any particular share he was to take. My wish was, as communicated to Mr. Brodie, that he should take one fourth share, provided the

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expenses did not exceed what we then contemplated: I should say about 25,000*l.* which I named to Mr. Brodie, and to which he did not object. I do not remember what Mr. Brodie said: I considered he acquiesced in that proposal." "It was a matter of honour on both sides. Upon the same principle, it was of course open to Mr. Brodie to the last to take a share or not. I recollect being asked whether I could have made any legal objection to Mr. Brodie objecting to take a share till October, 1833. My answer was—I presumed not, but that I should be at his mercy."

The defendant was consulted by Wilson in every stage. Between the year 1829 and the latter part of 1833, the monies from time to time advanced by the defendant to Wilson on account of the market amounted to 9,600*l.* On the monies so advanced the defendant received no interest. But during the same period Wilson had also obtained other advances from the defendant to the amount of 4,000*l.*, which had been subsequently repaid, with interest. Profits amounting to about 1,500*l.* had been derived from the market by Wilson prior to October the 15th, 1833; but these were not accounted for to the defendant.

The expense of the erection of the market eventually exceeded 50,000*l.* In 1832, Wilson obtained from Lord Portman a lease of the ground upon which the market stood, for ninety-nine years.

Agreement of
 Oct. 15, 1833.

On the 15th October, 1833, an agreement was entered into between the defendant of the one part, and Wilson of the other, the substance of which was as follows:—The sum at which the market was to be valued, as between the defendant and Wilson, was to be determined by a surveyor. The defendant was to be entitled to one undivided seventh part of the market for the term of years for which Wilson held the same of Lord Portman, and to take that seventh in satisfaction for so much of the sum of 9,600*l.*

which the defendant had advanced to Wilson as should be equal to one seventh of the sum at which the market should be valued. The defendant engaged to advance to Wilson 5,000*l.* more, for the purpose of enabling him to discharge such of the demands on him on account of the market as remained unsatisfied. If that sum should be insufficient for the purpose, in order to discharge all unsatisfied demands on account of the market, Wilson was to be allowed to borrow the requisite sum by mortgage of the market, in addition to a sum of 18,000*l.* for which it was already mortgaged. But the defendant's seventh share was not, as between him and Wilson, to be liable to that 18,000*l.*, or to any further sum for which the market might be mortgaged. The 5,000*l.* and 2,070*l.*, part of so much of the 9,600*l.* as would remain after deducting one seventh of the sum at which the market should be valued, with interest at 4 per cent. were to be secured to the defendant's trustees by a mortgage of certain estates in Wales belonging to Wilson. If any part of the 9,600*l.* should remain, after deducting the seventh of the sum at which the market should be valued, and the 2,070*l.*, then Wilson was to pay to the defendant the sum remaining, with interest at 5 per cent. If one seventh of the sum at which the market should be valued, together with the 2,070*l.*, should exceed 9,600*l.*, then the defendant was to take upon himself so much of the 18,000*l.* secured on mortgage of the market as should be equal to the excess of the one seventh and 2,070*l.* over 9,600*l.*

The plaintiff had been employed to do the work in question by Wilson. He did not know the defendant: but the defendant was aware that the work was being done by him. The whole of the work was done in 1832 and the early part of 1833.

It was left to the jury to say whether the defendant, at the time the work was done, was jointly interested with Wilson in the speculation, so as to render him liable as a

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partner. The jury returned a verdict for the defendant, disaffirming the existence of a partnership between the defendant and Wilson prior to the 15th October, 1833.

Wilde, Serjeant, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the verdict was against evidence.

The Attorney-General, and *Talfourd*, Serjeant, shewed cause.—The defendant was no party to the agreement under which the work was done: and therefore the action can only be maintained upon the supposition that there existed at the time the debt was contracted a secret partnership between the defendant and Wilson. A mere contemplation of a future partnership would not render the defendant liable. Whether or not there was an existing partnership, was a question for the jury. The evidence given by Wilson on his examination was extremely loose, and but little calculated to advance the plaintiff's case. It clearly shewed no community of profits as between the defendant and Wilson anterior to the date of the agreement of the 15th October, 1833. No interest in the land was conveyed to the defendant: and the whole language of the agreement is prospective. In *Dickinson v. Valpy*, 10 B. & C. 128, 5 M. & R. 126—where it was sought to charge the defendant as a member of a mining company upon a bill drawn and accepted by order of the directors, it was proved that the company had entered into a contract for the purchase of mines, taken a counting-house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were appropriated to him; that he paid an instalment of 15*l.* per share; that he attended at the counting-house of the company, and there signed some deed, and afterwards attended a general meeting of the share-

holders—the court thought this was not sufficient evidence to shew that the defendant had ever become a complete partner in the company, or that he had held himself out to the world as such partner. “I think,” said Parke, J., “it is very difficult to say that there was sufficient evidence to go to the jury that the defendant actually was a partner; because all the acts proved and relied upon at the trial were equally consistent with the supposition of an intention on his part to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of an existing partnership. There is a great difference between the two cases. If there is a contract to carry on any business by way of present partnership between a certain definite number of persons, and the terms of that contract are unconditional and complete, I have already said that the partners give to each other an implied authority to bind the rest to a certain extent. But, if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other partners in the meantime enter into contracts, it seems to me to be clear that he is not bound by them, on the simple ground that he has never authorized them—always supposing that he has not held himself out, directly or indirectly, to the party with whom the contracts are made, as having in substance given that authority. In those cases in which a plaintiff has not been induced by the defendant’s representation *to give credit to him*, but seeks to fix him because he has *really authorized* the contract to be made, the plaintiff must shew that authority, and an authority upon condition not performed is no authority at all.” The principle of that decision was very much considered in this court in the

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subsequent case of *Fox v. Clifton*, 4 M. & P. 676, 6 Bing. 776, 2 M. & Scott, 146, 9 Bing. 115: as it also had been in the prior cases of *Vice v. Lady Anson*, 7 B. & C. 409, 1 M. & R. 113, 8 C. & P. 19, M. & M. 98, and *Bourne v. Freeth*, 9 B. & C. 632, 4 M. & R. 512.

Wilde, Serjeant, and *Hoggins*, in support of the rule.—The jury have clearly come to a wrong conclusion. The question was whether or not the defendant was a partner with Wilson at the time the work was done. The whole evidence shewed that they were from the first acting in concert, upon the footing and understanding of a joint interest in the works then in progress: and it is quite immaterial that the precise share or interest taken by each was not ascertained: the partnership was complete as soon as the proposition for it was made and accepted, and the money advanced upon the faith of it. Where a partnership is entered into without any stipulation as to the proportions, the partners are entitled in equal moieties—*Peacock v. Peacock*, 16 Ves. 49. The whole transaction teems with evidence of a partnership commencing from the grant of the lease from Lord Portman. Nothing was done without the defendant's sanction. Suppose Wilson had become bankrupt, could his assignees have taken the entire concern, repudiating the partnership? or, suppose the premises had been destroyed by fire, could the defendant, as between himself and Wilson, have treated as a loan the sums advanced (and for which no interest was paid or accounted for) for the purpose of creating the subject-matter of the partnership stock? The agreement of October, 1833, is not the commencement of the partnership: it merely embodies the previous understanding between the parties, reducing to writing that which had before only existed in parol (98). Upon a bill filed by him

(98) See *Battley v. Bailey*, 1 Gr. 155, where it was held, that, Scott's New Rep. 143, 1 Man. & where an agreement is entered into

against Wilson for an account of profits, the defendant would clearly have been entitled to an account of profits *ab ovo*. It is not immaterial to observe, that, in the agreement, the defendant consents that his share shall be mortgaged for the payment of the trades-people's bills. The question was not one simply of fact: it was compounded of law and fact. The jury were evidently misled by supposing it to be necessary, in order to constitute a partnership, that the respective shares should be ascertained and defined.

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TINDAL, C. J.—The question for our consideration in this case is, whether, upon the evidence presented to them, the jury have come to a wrong conclusion. I am of opinion that the verdict which has been found for the defendant ought not to be disturbed. The question is principally one of fact, viz. whether at the time the work was done there was an actually existing partnership in the market between the defendant and Wilson. That there had been communications between them with a view to the ultimate formation of a partnership, cannot be denied: and by the agreement of the 15th October, 1833, a regular joint interest was established. This agreement appears to me to form no unimportant part of the case. It provides for a partnership on and from that day: and, unless there be evidence of an actual partnership previously existing, the circumstance of the agreement ascertaining the day upon which it shall commence is extremely important. The whole language of the agreement seems to me to have reference to a future partnership. The first stipulation is that the sum at which the market *shall* be valued, as between the defendant and Wilson, *shall be deter-*

for a partnership to commence on a given day, the circumstance of the deed regulating the terms of the partnership not being executed

until a subsequent day, will not affect the liability of the members of the firm in respect of contracts entered into with third persons.

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mined by a surveyor: the next, that the defendant is *to be* entitled to one undivided seventh part of the market, for the term of years for which Wilson held the ground of Lord Portman. Now, it has been argued with considerable force, that this agreement is to be taken to have merely ascertained the quantum of the defendant's already existing interest in the concern, and to have a retrospective operation, giving the defendant a right to a share of profits from the commencement. But it appears to me that the instrument clearly has reference only to the unexpired term which Wilson had in the premises; and that, if the parties had so intended, they would have introduced more apt words to express such intention.

Such being the construction I put upon the agreement, let us see whether or not the jury were wrong in negating the pre-existence of an interest in the defendant. The examination of Wilson is extremely loose and unsatisfactory. He says, that, at the time of the passing of the act, Mr. Brodie was inclined to consider it, and to take an interest in the concern. That which we are to consider is whether there was any agreement between these parties that the defendant should take a *present* interest. Wilson goes on to say—"A conversation took place as to what I thought the market would cost. I told him, about 6,000*l*. He did not then make any proposal as to taking any share." Then comes another expression that is so indefinite that it would be difficult to say that a party's rights should be bound by it:—"My *impression* is that it afterwards passed in words between us, that Mr. Brodie was to take the half of such a thing as would cost 6,000*l*." I can only understand that as fairly referring to an interest to be taken by the defendant in the market when constructed: just as if a party, seeing a vessel on the stocks, were to agree, that, when the ship should be built, he would become a part-owner; though that would render him liable to become a partner in the vessel when ready for

sea, it clearly would give the builder no right to resort to him for the price. Wilson goes on to observe, that, during the progress of the work, larger sums were expended than had at first been contemplated; and says—"I conferred with Mr. Brodie as to the increase of expense: it led to an alteration as to Mr. Brodie taking the half. From that moment I gave up the idea of his taking half. I did not at that time propose to him taking any other share." "No distinct proposal," he adds, "was made as to any particular share he was to take. My wish was, as communicated to Mr. Brodie, that he should take one fourth share, provided the expense did not exceed what we then contemplated—I should say about 25,000*l.*, which I named to Mr. Brodie, and to which he did not object. I do not remember what Mr. Brodie said. I considered he acquiesced in that proposal." The question is whether this is evidence sufficiently precise to establish an intention in the defendant to take a present interest, or whether the whole had not reference solely to the formation of a future partnership. It does not appear to me to have been made out with sufficient certainty that the defendant took a present interest, to induce me to consent to disturb the verdict. There certainly are some points in the case that it would be very difficult to explain: but that affords not ground enough for disaffirming the finding of the jury. It is a circumstance in favour of the verdict, that no estimate was ever made. On the other hand, it is not easy to say why no interest upon the sums advanced by the defendant to Wilson should have been demanded or accounted for. But, upon the whole, I do not see sufficient ground for sending the cause down to a second trial.

BOSANQUET, J.—I am also of opinion that there is not sufficient ground for disturbing this verdict. The only question is, whether there was an actually subsisting part-

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nership between the defendant and Wilson at the time the work for which the action is brought was done. No doubt they contemplated a partnership at some time; but the question is whether this was matter of contemplation only, or of mutual obligation. I agree, that, in order to constitute a partnership, it is not necessary that the respective shares of the individual members of it should be precisely defined: but the absence of a definite arrangement of this sort, the matter being otherwise doubtful, has a strong tendency to shew that no partnership exists. It is clear that the defendant was wholly unknown to the plaintiff at the time the demand accrued: still, if he can shew that the defendant was then a partner in the undertaking, he has a right to resort to him; but the burthen of proving that fact is cast upon the plaintiff. The evidence that is relied on as establishing a partnership, consisted of the agreement of the 15th of October, 1833, and the examination of Wilson. The agreement constitutes a partnership from the day of its date; and it is some evidence to go to the jury as to what was the previously existing relation of the parties: but it cannot, *proprio vigore*, constitute a partnership retrospectively operating so as to render the defendant liable for contracts previously made by Wilson. The examination of Wilson contains no evidence of an express agreement for a present partnership; though it details circumstances that are very fit for the consideration of the jury. The most the statements of Wilson amount to is, that he had a certain impression or understanding upon the subject. To constitute an agreement, there must be the mutual understanding of both parties. But Wilson says: "It was a matter of honour on both sides. It was of course open to Mr. Brodie to the last to take a share or not. I recollect being asked whether I could have made any legal objection to Mr. Brodie objecting to take a share till October, 1833. My answer was: I presumed not, but that I should be at his mercy." It is clear, therefore, that

there was no idea of mutual obligation between them. Then, the circumstance of the defendant's interest being undefined, is in favour of the verdict. Again, the fact that the defendant received no interest upon the large advances made by him, tells the other way. The absence of any accounting for prior profits also affords an argument in favour of the defendant. But all these were matters for discussion before the jury, and proper to be decided by them. The agreement of October, 1833, provides that Mr. Brodie is to be interested in the premises for the *whole* term granted by Lord Portman to Wilson: and upon this has been built an argument that his interest in the concern must of necessity date from a time anterior to the making of the agreement. I am not prepared to say that this is the necessary result of the agreement. If an interest in the whole term were assigned to him, it does not appear to me that that would entitle Mr. Brodie to call for an account of profits accruing before the 15th October, 1833. But, even if that were so, it would not give the agreement a retrospective effect, so as to create a liability quoad third persons. Upon the whole, it appears to me that the verdict is warranted by the evidence.

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COLTMAN, J.—I am of the same opinion. The question is a mixed one of law and fact. The agreement creates a partnership only from its date: it is prospective in terms. The defendant was to be entitled to an interest in a certain share in the market for the term of years for which Wilson then held the same: and Wilson had then only an interest in the *residue* of the term. Then, is the other evidence in the case inconsistent with this construction? I see nothing in the examination of Wilson that at all militates against the notion of Mr. Brodie having made the advances he did upon the faith and expectation of having a stipulated share of profits, the time for the commencement of the partnership to be afterwards fixed by agree-

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ment of the parties. If the agreement were colorable, the case might perhaps be different. But there can be no ground for doubting its perfect bona fides.

ERSKINE, J.—There certainly are many circumstances in this case having a strong tendency to support the argument of my brother Wilde; but there are also other circumstances having at least an equally strong tendency the other way: and when I consider that it was for the plaintiff to establish that at the time the work in question was done the defendant was a partner with Wilson, I am not disposed to quarrel with the finding of the jury. The agreement certainly does not entitle the defendant to claim any interest in profits that might have been made before its execution: and the weight of evidence shews that no joint interest existed anterior to that date. All that I can with certainty collect is, that Mr. Brodie was to have the option of taking or declining a share on the completion of the market, and that he did not stand in the position of a partner until he finally and definitely decided what share he would take. That he did not do until the 15th October, 1833. There was no partnership before that time.

Rule discharged.

Wednesday,
Nov. 13th.

WARREN v. SIR J. C. ANDERSON, Bart.

In an action against the acceptor of a bill of exchange, the only proof of the handwriting of the defendant was that of a banker's clerk, who

ASSUMPSIT by an indorsee against the defendant as the acceptor of certain bills of exchange.

Pleas—first, that the defendant did not accept—secondly, that the bills were made in blank, and placed for the purpose of discount in the hands of certain persons,

stated, that, two years ago he saw a person calling himself by the defendant's name sign a book, that he had never seen him since, but that he thought the handwriting was the same, and had since seen cheques bearing the same signature:—Held, that this was evidence to go to the jury.

by whom they were negotiated without authority and without consideration.

At the trial, before Erskine, J., at the sittings at Westminster in the present term, the only evidence to shew that the acceptance of the bills was in the handwriting of the defendant, was that of a clerk in Coutts's banking-house, who stated, that, two years since, he saw a person calling himself Sir J. C. Anderson, Bart., enter his name in a book there as "J. C. Anderson;" that he did not know the individual, and had never seen either him or the book since: and, on being shewn the bills in question, he said he thought the handwriting the same as that in the book, and that he had since seen cheques similarly signed pass through the banking-house.

On the part of the defendant, it was submitted that this was not evidence to go to the jury; and the learned judge was called upon to nonsuit the plaintiff. The case was however left to the jury, who returned a verdict for the plaintiff.

Andrews, Serjeant, now moved for a nonsuit or a new trial, on the ground suggested at the trial.

PER CURIAM.—The evidence of handwriting was certainly extremely slender; but we are not prepared to say that it was an absolute blank.

Rule refused.

DOE *d.* GREENE *v.* ROE.

BOMPAS, Serjeant, moved for judgment against the casual ejector. The declaration was erroneously intituled

Wednesday,
Nov. 13th.

An error in the title of a declaration in ejectment, such as, intituling it of

a term not yet arrived, will not disable the lessor of the plaintiff from moving for judgment, even though the notice *has no date*.

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"Trinity Term, 3 Victoriæ," a term that had not yet arrived. He referred to *Doe d. Crooks v. Roe*, 6 Dowl. 184, where a rule was granted upon a declaration having a similar defect.

The Officer observed that here the notice *had no date*.

TINDAL, C. J.—It is good from the delivery.

Rule granted (99).

(99) See *Doe v. Roe*, 1 Tyr. 280, 1 C. & J. 330.

BROWN v. WATSON.

Tuesday,
Nov. 19th.

By a judge's order, a cause and all matters in difference between the plaintiff and defendant were referred to arbitrators, with power, should they find any money to be due from the defendant to the plaintiff, to direct one

THIS cause and all matters in difference between the parties were by a judge's order referred to arbitration; and it was ordered that the plaintiff should purchase of the defendant and the defendant sell to the plaintiff a moiety of the brig *Test* for 940*l.*; and that, if the arbitrators should find any money to be due from the defendant to the plaintiff, one moiety of it should be paid by the defendant at such time and place as the arbitrators should direct, and the remaining moiety be retained by the de-

moiety of it to be paid by the defendant at such time and place as they should think fit, and the remaining moiety to be retained by the defendant in part payment of the purchase-money of the defendant's share of a brig, in respect of which the disputes had arisen; and the arbitrators were to be at liberty to award to the plaintiff, if they should think fit, such sum as he should be entitled to, if any, in consequence of his providing another master to take charge of the brig on her then present voyage from London to Archangel and back, in order to have the matters in difference brought to a speedy conclusion. The arbitrators awarded that there was due from the defendant to the plaintiff (including the sum the plaintiff was entitled to for providing a new master as aforesaid) 50*l.* 17*s.* 6*d.*, a moiety of which they directed the defendant to pay on a certain day, and to retain the other moiety in part payment of the purchase-money of his share of the brig. One of the matters in difference before the arbitrators, was, by which of the parties certain debts incurred on account of the brig should be borne. As to this the arbitrators awarded that debts incurred previously to a given day should be borne by them in equal moieties, and those incurred subsequently by the plaintiff alone; and they ordered the plaintiff to give the defendant a bond of indemnity in respect of such last-mentioned debts:—Held, that the award was good—Maule, J., doubting as to the bond.

fendant in part payment of the said sum of 940*l.* for the defendant's share of the brig; and, should it exceed 940*l.*, then the plaintiff was to mortgage the brig to the defendant for the deficiency: that, on the day the arbitrators should direct the defendant to pay the moiety of the sum due from him, he should deliver to the plaintiff a bill of sale of the defendant's moiety of the brig, and the plaintiff should at the same time execute and deliver to the defendant a mortgage of the brig, to secure to him the difference between the sum to be paid by him and 940*l.*; and that the arbitrators should be at liberty to award to the plaintiff, if they should think fit, such sum as he might be entitled to, if any, in consequence of his providing another master to take charge of the brig on her then present voyage from London to Archangel and back, in order to have the matters in difference brought to a speedy conclusion.

The arbitrators made their award on the 29th March, 1839, finding that there was due from the defendant to the plaintiff in respect of the cause and matters in difference (including the sum which, in the judgment of the arbitrators, the plaintiff was entitled to in consequence of his providing another master to take charge of the brig on the said voyage) 50*l.* 17*s.* 6*d.*, a moiety of which they directed the defendant to pay to the plaintiff on the 8th June, 1839, the other moiety to be retained by the defendant in part payment of the purchase-money of his share of the brig. They further awarded that the parties should pay in equal moieties all debts incurred in respect of the brig previously to the 24th March, 1838, and that the defendant should not be liable for any portion of the debts incurred for the brig after that day: and they ordered the plaintiff, at his own expense, to prepare and deliver to the defendant on the 8th June, 1839, a bond, in the penal sum of 1,500*l.*, conditioned for the payment by the plaintiff of all debts in-

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curred in respect of the brig subsequently to the 24th March, 1838.

F. Kelly, on the part of the plaintiff—upon an affidavit, that, between the 24th March, 1838, and the 3rd August, 1838 (on which latter day the plaintiff agreed with the defendant for the purchase of his moiety of the brig), the debts incurred in respect of the brig amounted to 100*l.* and upwards; and that, had the plaintiff known that the arbitrators had power to order the plaintiff to pay all the debts incurred subsequently to the 24th March, he would not have consented to give so much as 940*l.* for the defendant's moiety of the brig—obtained a rule nisi to set aside the award, on three grounds—first, that it was not final or certain, the arbitrators not having stated what portion of the sum of 50*l.* 17*s.* 6*d.* they had awarded in respect of providing another master to take charge of the brig on the voyage from London to Archangel and back, and the arbitrators having no authority to direct a moiety of the 50*l.* 17*s.* 6*d.* to be paid and retained as they had done—secondly, that the arbitrators had not ascertained the amount of the debts which they had directed to be borne in equal moieties; that they had made no provision for the payment of such debts, nor for the re-payment of any sum by one party to the other in case either party should pay more than one moiety of such debts; and that they had made no final award or adjustment of the said debts—thirdly, that the arbitrators had no power to order such bond to be given as stated in their award.

Wilde, Serjeant, and *S. Martin*, shewed cause, upon an affidavit which stated that the defendant, having had several disputes with the plaintiff about the brig, caused the proposed employment of her by the plaintiff to be stopped on the 24th March, 1838, by process out of the Admiralty

Court; that the disputes continued from that time until the 3rd August, when the agreement which is embodied in the above reference was come to; that there was no matter in difference as to the amount of the debts due in respect of the brig, or the mode of paying them, nor were the arbitrators called on to ascertain them; but that the principal matter submitted to them was, up to what date the joint liability ought to continue, and from what date the plaintiff should be separately chargeable.

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1. The arbitrators were not bound to make the distinction suggested. They are to ascertain what shall be due between the parties. The order in express terms gives them an absolute discretion (which, indeed, they would have had without them) as to the time and place of payment.

2. The second objection is answered in fact. [This *Kelly* assented to.]

3. The arbitrators were not guilty of an excess of authority in directing the plaintiff to give a bond of indemnity. In *Cooke v. Whorwood*, 2 Saund. 337, 2 Lev. 6, 2 Keb. 767, it was held that an award that one of the parties shall be bound in a bond to another, is good, but not that he shall find a surety to enter into a bond. So, in *Booth v. Garnett*, 2 Str. 1082, And. 28, it was held that awarding the giving a note is the same as awarding payment at a future day. The court said "that awards were to have a reasonable intendment: and all the meaning of this was to give the party time, and is equal to ordering him to pay the money at a future day, without saying anything of giving a note in the mean time." Arbitrators may direct releases to be given without any special authority, such power being essential to enable them to carry into effect the intention of the parties. In *Philips v. Knightley*, 2 Str. 903, the award was that the defendant should execute a covenant to indemnify the plaintiff against all costs, damages, and expenses, which should happen by means of

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any further proceedings in an action begun at the instance of the defendant and at issue in the Common Pleas, wherein one Marshall was plaintiff, and the plaintiff defendant. Page, J., thought this award bad, as not putting a final end to the suit, but only giving the plaintiff a new action of covenant. But the other judges were of opinion that the award was good, and that it did not lie in the mouth of the defendant to make this objection. And they said there was no difference between a bond and a covenant, for the remedy is by action in both cases.

Kelly and Butt, in support of the rule.—1. The 50*l.* 17*s.* 6*d.*, was in respect of a matter arising after the date of the submission, and not included in it: and the award being entire, if bad in part, it is bad altogether. Where the arbitrators are laymen, it is important that they should be confined strictly within the limits of the order of reference. 2. The giving a bond clearly was not contemplated here. Commercial men are frequently prohibited by their articles of partnership from entering into bonds. In *Cooke v. Whorwood*, the bond was for payment of money on a day certain, and therefore in its nature final. Here there is nothing certain or final.

TINDAL, C. J.—The first objection made to this award is, that it is not final or certain, the arbitrators not having stated what portion of the sum of 50*l.* 17*s.* 6*d.* they had awarded in respect of providing another master to take charge of the brig on a voyage she was bound for at the date of the submission, and the arbitrators having no authority to direct a moiety of the 50*l.* 17*s.* 6*d.* to be paid and retained as they have done—one moiety to be paid by the defendant to the plaintiff on a given day, and the other to be retained by the defendant in part payment of the purchase-money of his share of the brig. Looking at the terms of the order of reference, it appears to me that

this objection fails. The reference is of all matters in difference. The first power given to the arbitrators, is, in case they should find any money to be due from the defendant to the plaintiff, to direct the moiety of it to be paid by the defendant at such time and place as they should think fit, and the remaining moiety to be retained by the defendant in part payment for the defendant's share of the brig. That, undoubtedly, is confined to debts or demands existing at the time of the submission. But a subsequent clause seems to treat this growing demand as if it were a by-gone claim: it provides, that the arbitrators should be at liberty to award to the plaintiff, if they should think fit, such sum as he should be entitled to, if any, in consequence of his providing another master to take charge of the brig on her then present voyage from London to Archangel and back, in order to have the matters in difference brought to a speedy conclusion. In Comyns's Digest, *Arbitrament*, (E. 9), it is said—"There shall not be a strained construction of an award to make it be out of the submission." It has further been objected that the arbitrators had no power to order the plaintiff to give a bond of indemnity. If this objection were allowed to prevail, it would only have the effect of rendering the award void as to this part. But, upon the authorities, it seems to me that the directing such bond to be given was not beyond the authority of the arbitrators. An award that one shall give the other a bond for such a sum with such sureties as the other shall approve, and that they shall make mutual releases, is not final, and therefore void; for, if the party disapprove of the sureties, he need not sign the release—*Thirsby v. Helbot*, 3 Mod. 272, 1 Show. 82, Carth. 159. "But an award, to give a bond for payment, is good"—Com Dig. *Arbitrament*, (E. 15.), citing 1 Rol. 249, l. 40. In *Philips v. Knightley*, 2 Str. 903, an award that the defendant should execute a covenant to indemnify the plaintiff against all costs, damages, and expenses which

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should happen by means of any further proceedings in an action begun at the instance of the defendant, was held good. And in *Cooke v. Whorwood*, 2 Saund. 337, 2 Lev. 6, 2 Keb. 767, it was held that an award that one of the parties shall be bound in a bond to another, is good, though not that he shall find a surety to enter into a bond. These authorities appear to me to govern the present case.

BOSANQUET, J.—I am of opinion that the arbitrators were justified in treating and dealing with the expense of providing a new master to take charge of the ship for the voyage as a matter in difference within the terms of the submission; and that, when they were authorized to ascertain what was due in respect thereof, they were also authorized to ascertain and determine when it should be paid. As to the bond—one of the matters for the arbitrators to determine was, whether certain debts which had been incurred on account of the brig should be borne by the one party or the other. The arbitrators award that the parties shall pay in equal moieties all debts incurred in respect of the brig previously to a given day, and that the plaintiff alone shall pay those subsequently incurred. The creditors could not be bound by the award: they might still sue both: and therefore the arbitrators directed that to be done which was absolutely necessary to carry the award into effect, viz. a bond of indemnity to be given. *Cooke v. Whorwood* is an authority to shew, that, though it is not competent to arbitrators to direct a bond with a surety, an award that the party shall alone enter into a bond is good. But, independently of authority, it seems to me that the award in this case is unexceptionable.

COLTMAN, J., was absent.

MAULE, J.—As to the first point, I feel no difficulty. The arbitrators clearly were bound to take into account

the money paid by the plaintiff in order to provide a new master for the vessel. Upon the other point, however, I do not entertain quite so clear an opinion. The cases cited are not very satisfactorily reported: the terms of the submissions do not appear. Properly the arbitrator should direct money to be paid forthwith: the directing a bond to be given is an indulgence to the party. In *Cooke v. Whorwood*, the bond was for payment of money at a given time. In *Philips v. Knightley*, it was never objected that the award of a covenant to indemnify was beyond the authority of the arbitrator: there might have been something in the submission to warrant it. I rather incline to think that an arbitrator has no right to award a bond, except for payment at a day certain of a sum for which he might have awarded a money payment. This, however, is not material; for, if the objection were to prevail, it would only avoid the award pro tanto.

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Rule discharged, with costs (100).

(100) See *Ross v. Boards*, 8 Ad. & E. 290, 3 N. & P. 382. There A. agreed to purchase land of B., the title to be made out to the satisfaction of B.'s attorney. The agreement being uncompleted, and disputes arising, all matters in difference between the parties, and the settlement of all questions on the agreement, were referred to arbitration. The arbitrator awarded that B. should convey to A. the title to the above land, contained in two abstracts given in evidence on the arbitration; he also prescribed the boundary of the land so to be conveyed, and ordered that B. should execute an indemnity bond to A., to be forfeited if A. should be evicted by reason of defect in the title; and that, on execution of the conveyance, A. should pay the purchase-money. Nothing further

was awarded as to the validity of the title. The goodness of the title had been a matter of dispute before the arbitrator. It was held that the award was bad, as not finally determining the questions referred. "The arbitrator," says Lord Denman, "leaves it in doubt whether the title is good or bad, and, in effect, orders that it shall be taken with all faults. The doubt is rendered stronger by the direction that an indemnity bond shall be executed, *which is more than the arbitrator had a right to order*. The award is not final, because, instead of deciding the questions referred, it sets on foot new ones; and, instead of ascertaining a right for the plaintiff, gives him a new action for the recovery of damages."

1839.

*Thursday,
Nov. 14th.*

In an action against the defendant charging him as the acceptor of a bill of exchange, the only evidence to affect him was, that the proceeds of the bill as well as of three promissory notes which his wife (in the defendant's name) and the plaintiffs' testatrix had jointly signed, had been applied in discharge of the defendant's debts:—Held, insufficient.

GOLDSTONE and Another, Executors of ANN TOVEY,
Deceased, v. THOMAS TOVEY.

THIS was an action of assumpsit against the defendant as acceptor of a bill of exchange for 100*l.* drawn in November, 1836, by Ann Tovey, the testatrix, payable three months after date; and for 400*l.* paid by the plaintiffs as executors of Ann Tovey to the defendant's use. To the count on the bill, the defendant pleaded that he did not accept, and as to the rest of the declaration, non assumpsit.

The cause was tried before Tindal, C. J., at the sittings at Westminster after Trinity Term, 1838. It appeared that the bill in the first count mentioned was paid by Mrs. Tovey when it arrived at maturity; and that the 400*l.* were paid by the plaintiffs after her decease, being the amount of three joint and several promissory notes, purporting to be made by the defendant and Ann Tovey, for 100*l.*, 200*l.*, and 100*l.* respectively. There was no evidence to shew by whom the defendant's name was written on the bill of exchange: but it appeared that the promissory notes were subscribed with the defendant's name by his wife, who (he being an innkeeper) had the chief management of his business, and that the bill of exchange and the notes had been applied in discharge of the defendant's trade debts.

It further appeared, that, when Ann Tovey drew the bill in November, 1836, she told the banker by whom it was discounted, that it was drawn on her own account, she being desirous to assist her step-son, the defendant, who was in embarrassed circumstances: and when she signed the promissory notes she also signed letters (written in her name by the defendant's wife) addressed to the creditors to whom the notes were paid, stating that the amount of them was a gift from her to the defendant.

His lordship told the jury that he was of opinion that there was no evidence to warrant a verdict for the plaintiff on the count upon the bill, there being nothing to shew by whom or by what authority the defendant's name had been affixed to it: and, as to the 400*l.*, he left it to them to say whether the notes were intended by Mrs. Tovey as a gift or merely as a loan.

The jury returned a verdict for the defendant.

Bompas, Serjeant, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the question whether or not the defendant had authorized his name to be placed upon the bill, had been in effect withdrawn from the jury, and that the verdict was not warranted by the evidence.

Erle and *Bingham* shewed cause, contending that the direction of his lordship was unexceptionable, and that the evidence fully warranted the conclusion to which the jury came, the question being one peculiarly for them.

Bompas, Serjeant, in support of his rule, submitted that the circumstance of the proceeds of the bill and the promissory notes having been applied in liquidation of the defendant's debts, was irresistibly strong to shew that he had sanctioned the affixing his name as the acceptor of the bill, and so the learned Chief Justice should have told the jury.

TINDAL, C. J.—On reference to my note of what took place at the trial, I do not find that anything was withdrawn from the jury. I certainly did leave the case to them with a strong intimation of opinion that they ought to find the first issue for defendant. And I still retain that opinion. There was no evidence to shew that the defendant's wife was authorized to accept the bill, or that she

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did in fact accept it. The circumstance of her having some months after signed the three promissory notes in his name, certainly was not evidence to fix the defendant as the acceptor of the bill. As to the other point, the question was one peculiarly fitted for the consideration of the jury: and I think we ought not to disturb the verdict.

BOSANQUET, J.—I am of the same opinion. There was no evidence that the acceptance of the bill was the act either of the defendant or of his wife; and no evidence of any express authority in the wife to accept. Authorities of this sort are construed strictly. In *Murray v. The East India Company*, 5 B. & Ald. 204, it was held that a power of attorney authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all moneys, debts, and dues whatsoever, and to give sufficient discharges, did not authorize him to indorse bills for his principal. The fact of the wife having some time afterwards signed the three notes makes no difference.

COLTMAN, J.—The circumstance of the proceeds of the bill having been applied in discharge of the defendant's debts, is not of itself sufficient proof that he authorized the acceptance: there should have been distinct evidence of authority.

MAULE, J.—I am also of opinion that there was no evidence to warrant the jury in finding the first issue in favour of the plaintiffs. The fact of the defendant's business being chiefly conducted by his wife, gives her no authority to charge him by her acceptance of bills. That the proceeds found their way into the pockets of the defendant's creditors, in no degree alters the case.

Rule discharged.

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STERT and Another, Executrix and Executor of JANE
BROWN, Deceased, v. PLATEL.

Saturday,
Nov. 23rd.

THIS was an action of assumpsit brought by the plaintiffs as executrix and executor of Jane Brown, deceased, to recover from the defendant the sum of 120*l.* alleged to have become due from him to her in her lifetime, for the use and occupation of two messuages, with the appurtenances, at Peterborough, in the county of Northampton. The defendant pleaded the general issue. A verdict was found for the plaintiffs, with 120*l.* damages, subject to the opinion of the court upon a special case; upon the argument of which case this court pronounced judgment for the plaintiffs in Easter Term last—ante, Vol. 7, p. 422, 5 New Cases, 434.

The Master having on taxation allowed the plaintiff the expenses of a witness, who was brought from France for the purpose of proving that the tenant in tail (upon whose will the question arose) died unmarried and without issue, the briefs shewing that he would have proved these facts, had not the course the cause took rendered such proof unnecessary—The court refused to send the matter back to him.

On the taxation of costs, the Master allowed the expenses of a witness named Linant, a native of France, who was brought over for the purpose of proving that Abraham David Hake, the tenant for life, under whose will the question arose, who had for many years resided in France, died there unmarried and without issue.

Bompas, Serjeant, on a former day, obtained a rule nisi for a review of the taxation, on the ground that the production of this witness was unnecessary, he having been called merely to prove the due execution of the will.

Adams, Serjeant, shewed cause.—It was an essential part of the plaintiffs' case to prove that Abraham David Hake died unmarried and without issue: the expenses of the witness whose name was in the briefs for the purpose of being called to prove this fact, were properly allowed.

Bompas, Serjeant, in support of his rule.—The party was one of the subscribing witnesses to the will: the sug-

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gestion that he was brought over for the purpose of proving that the tenant for life died unmarried and without issue, was an after-thought. There was already an allowance of 9*l*. 6*s*. for the attendance of a person from Doctors' Commons with the will. Besides, the plaintiffs should have applied for an admission of the fact.

TINDAL, C. J.—The attendance at the trial of some person who knew Abraham David Hake was necessary in order to shew that he died without issue. The attorney having sworn that the witness in question was called as well to give this evidence as to prove the will, we cannot take upon ourselves to say that he was improperly or unnecessarily brought over. Besides, the Master had the briefs before him, and he must have seen what it was intended that the witness should prove.

BOSANQUET, J.—It was necessary that some person should be called who had known Abraham David Hake down to the time of his death, and who could speak to the fact of his having died unmarried and without issue. I therefore think the Master has done right.

COLTMAN, J., was absent.

MAULE, J.—The precise ground upon which the Master allowed the costs does not appear. We must, however, until the contrary is shewn, assume that he allowed them upon a ground upon which he was justified in allowing them. If it had been made to appear that the fact the witness was called to prove was susceptible of proof by a witness from a less distance, the Master no doubt would have exercised his discretion as to the sum he would allow. But I see no reason for objecting to the taxation.

Rule discharged.

KEMP v. MATTHEW.

BYLES, on a former day in this term, obtained a rule, calling upon the plaintiff to shew cause why a warrant of attorney given by the defendant, and execution issued thereon, and all proceedings, should not be set aside, on the grounds that no appearance had been entered, and that there was no sufficient attestation within the statute 1 & 2 Vict., c. 110, s. 9. It appeared that the attestation was in due form; but that the name of the attesting attorney was suggested to the defendant by the plaintiff's attorney. The affidavit of the defendant upon which the motion was founded, stated, that, when the warrant of attorney was about to be executed, the plaintiff's attorney informed the defendant it would be necessary for some attorney on his behalf to be present at its execution, and to explain its nature and effect, and then asked the defendant if he knew any attorney in the neighbourhood who could act for him; that the defendant replying that he did not, the plaintiff's attorney said he would go and fetch an attorney; that he accordingly went out and brought one E. A. B.,

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The court set aside a warrant of attorney and execution issued thereon, on the ground that the name of the attorney who attested the execution in the name of the defendant, was suggested to the defendant by the plaintiff's attorney. See post.

"110. Where, after making that it is expedient that provision should be made for giving every person executing a warrant of attorney in solemn judgment, or a cognate attestation, the information of the nature and effect thereof, enact that no warrant of attorney in solemn judgment, or any person, shall be a sufficient attestation, given by any person, shall be of any force, unless there shall be present some attorney at law of the superior courts at law, or of such person, replying, stating, by him, and attending in his report to inform him of the nature and

effect of such warrant or cognate attestation, which attorney shall subscribe his name as a witness in the due execution thereof, and attorney before him, and to be attesting for the person executing the same, and that he shall be so and attesting."

The Court then stated that a warrant of attorney in solemn judgment, or cognate attestation, not executed in manner aforesaid, shall be void, and that it is of the law of the superior courts at law, and that the Court was fully informed in some cases.

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who read over and explained the warrant of attorney to the deponent, and attested the execution thereof; but that the deponent did not send for, nor did he request the plaintiff's attorney to send for the said E. K. R., but the said E. K. R. was expressly named by the plaintiff's attorney, although the deponent afterwards approved of his witnessing the warrant of attorney on his behalf.

W. H. Watson shewed cause (103), upon an affidavit of the plaintiff's attorney, who deposed that he named Mr. R., and the defendant requested him to procure his attendance; and it afterwards appeared that the defendant and Mr. R. were known to each other, Mr. R. having before been professionally concerned for the defendant.—The act has been substantially complied with. The attorney by whom the defendant's execution of the warrant of attorney was attested had on former occasions been employed professionally for the defendant.

Byles, in support of his rule.—The statute clearly has not been complied with either in the letter or the spirit. In *Fisher v. Nicholas*, 2 Dowl. 251, it was held that the rule of Hilary Term, 2 Will. 4, s. 72, respecting cognovits given by prisoners (104), must be strictly complied with; and it must appear that the attorney who attended on behalf of

(103) The Masters stated that the appearance is very rarely entered. They did not deem it necessary. See *Richardson v. Daly*, 4 M. & Welsby, 384, 7 Dowl. 25.

(104) Which directed that "no warrant of attorney to confess judgment, or cognovit actionem, given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force unless there be present some attorney on

behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney."

the defendant did so *at his request*, and *was named* by him: a substantial compliance with the rule is not sufficient. And in *Walker v. Gardner*, 4 B. & Ad. 371, a debtor, being arrested, offered a warrant of attorney. The plaintiff's attorney, who had also advised the defendant in previous stages of the business, came at his request to the place where he was in custody, and proposed another attorney, whom he brought with him, to read over the warrant of attorney to the defendant, and attest it on his behalf. The defendant acquiesced; but the attorney so introduced was not known to or sent for by him: and the court held that this was not a compliance with the rule of Easter Term, 4 Geo. 2, which declares that no warrant of attorney executed by a person in custody of the sheriff, &c., shall be valid, unless there be present an attorney on his behalf, to be expressly named by him, and attending at his request, to witness it; and the warrant of attorney and proceedings thereon were set aside for irregularity.

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TINDAL, C. J.—I am not satisfied that there has in this case been a compliance with the statute. The defendant merely adopts a suggestion made to him by the plaintiff's attorney. Instead of naming an attorney, he might have desired the defendant, if he himself knew no professional person, to ask a friend to recommend one. The rule must be made absolute.

BOSANQUET, J.—I also think there is so much doubt in this case that we cannot adopt a safer course than hold the attestation to be insufficient. The suggestion of a name comes from the plaintiff's attorney. An acquiescence on the part of the defendant will not do: the attorney must be expressly named by him, and attending at his request.

MAULE, J.—Though I feel some doubt, yet I am not so

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satisfied that the statute has been complied with, as to induce me to refrain from deferring to the opinions of my Lord Chief Justice and my Brother Bosanquet.

Rule absolute, with costs, the defendant undertaking to bring no action (105).

(105) And see *Hutson v. Hutson*, 7 T. R. 7; *Todd v. Gompertz*, 6 Dowl. 296; *White v. Cannon*, 6 Dowl. 476; *Cox v. Cannon*, 6 Scott, 347, 4 New Cases, 453, 6 Dowl. 625—as to attestations under the rules of court.

And, as to attestations since the 1 & 2 Vict., c. 110, see—*Rice v. Linstead*, 6 Scott, 895, 7 Dowl. 153; *Oliver v. Woodroffe*, 4 M. & Welsby, 650, 7 Dowl. 166; *Haigh v. Frost*, 7 Dowl. 743; *Barnes v. Pendrey*, 7 Dowl. 747; *Mason v. Riddle* (or *Kiddle*), 8 Dowl. 207, 5 M. & Welsby, 513; *Chipp v. Harris*, 5 M. & Welsby, 430; *Taylor v. Nicholl*, 8 Dowl. 242, 6 M. & Welsby, 91; *Rising v. Dolphin*, 8 Dowl. 309; *Sanderson v. Westley*, 6 M. & Welsby, 98, 8 Dowl. 412.

In *Barnes v. Pendrey*, 7 Dowl. 747, *Coleridge, J.*, says :—"On the facts of this case, I am to see whether there was present any attorney for the defendant, *expressly named by him, and attending at his request*. I am to see if this was really done. It appears from the affidavits, that, at the time there was an intention to give the cognovit (no fraud being imputed to the parties), the plaintiff's attorney inquired of the defendant if he had any attorney who would be present on his part; that the defendant said he had not, and ex-

pressed a wish that the plaintiff's attorney would send for some person to act for him; that the plaintiff's attorney then told his clerk to go and prepare a cognovit, and get some one to act as the attorney of the defendant: no person whatever was then named; it was left entirely to the clerk to find some one, and there is no doubt that there was no intention on the part of the plaintiff's attorney to select an improper person; but *I must see if the defendant had any opportunity of exercising any option in the choice of the attorney*. The clerk then goes and procures a person to attend for the defendant; he comes in to where the defendant is, and then for the first time the defendant knows his name or anything about him. He was then asked to act as his attorney, and the plaintiff wrote the request in the margin of the cognovit, which has been referred to; but, if I was to give any weight to that request, I should be letting in all the mischief which it was the intention of the act to prevent. A person so brought in, I think, cannot be considered as one chosen by the defendant. The language used may be merely dictated by the other party, and it cannot be considered more than a mere adoption of a person named by the other side. If, therefore, I

was to decide this case on principle only, I should have no difficulty in making the rule absolute." And, after referring to *Bligh v. Brewer*, 3 Dowl. 266, 1 C. M. & R. 651, 5 Tyr. 222, and *Oliver v. Woodruffe*, 7 Dowl. 166, he made the rule absolute for setting aside the *cognovit* and all subsequent proceedings.

But in *Taylor v. Nicholl*, 8 Dowl. 242, 6 M. & Welsby, 91, the court of Exchequer took a different, and evidently a more *correct* view of the statute. "We are," says Parke, B., "to construe the words as we find them—adding nothing to them, detracting nothing from them. The attesting attorney must be 'expressly named' by the defendant. But we cannot therefore suppose that it was intended that the defendant must expressly pronounce at length the Christian and surname of the attorney; but he must be *expressly* named by him, in contradistinction to his being *impliedly* named or adopted. There is not a word to lead to the conclusion that he must be *originally* or *spontaneously* named by the party, or to exclude the suggestion of a name by a third person. What then is there to exclude the suggestion of a name by the plaintiff's attorney? I cannot import such words into the act, when no such prohibition is expressed in it. It must not, undoubtedly, be the plaintiff's attorney himself who is named by the defendant, because it is impossible that the same person can be, for such a purpose, the attorney both of the plaintiff and the defendant, acting for two ad-

verse interests at once; and to that extent, therefore, we must modify the words of the act of parliament. But, if the defendant *bonâ fide* agree to accept as his attorney a person named by the plaintiff's attorney, and use his services accordingly, that will be sufficient. That was the rule laid down in *Bligh v. Brewer*, 1 C. M. & R. 651, 5 Tyr. 222, 3 Dowl. 266, in which all the previous cases on this subject were considered; and I am not aware that the authority of that decision has ever been called in question." Alderson, B., says:—"It seems to me that the act has been complied with in substance. The attorney was named by the defendant, his name having been acceded to by him after it was suggested by the plaintiff's attorney, and he having been expressly accepted by the defendant, when asked if he wished that he should act in his behalf. The act has been complied with, unless we incorporate into it words which are not to be found in it, viz. that the attorney must be named by the defendant *originally* and without the suggestion of any other person." Gurney, B., says: "The effect of the suggestion of a name by the plaintiff's attorney is a good ground for watching the case more narrowly, but the act does not require that the name should originate with the defendant, if the attorney be expressly adopted by him." And Rolfe, B., adds: "It is clear the act has been *literally* complied with, because the attorney was expressly named by the defendant."

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MEMORANDA.

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Queen's Coun-
sel.

On the 17th February, 1840, George James Turner, Esq., of Lincoln's Inn, David Dundas, Esq., of the Inner Temple, and Richard Bethell, Esq., of the Middle Temple, were appointed her Majesty's Counsel learned in the Law—to take rank next after Robert Baynes Armstrong, Esq.

Wilde, Ser-
jeant, knighted.

On the 19th, Thomas Wilde, Esq., who had previously been appointed her Majesty's Solicitor-General, received the honor of knighthood.

Queen's Coun-
sel.

On the 21st, Robert Baynes Armstrong, Esq., of the Inner Temple, was appointed one of her Majesty's Counsel learned in the Law, to take rank next after Griffith Richards, Esq., Q. C.

Patents of pre-
cedence.

Serjeants Adams, Andrews, Storks, Ludlow, Bompas, Goulburn, and Talfourd, received patents of precedence, conferring upon them the rank they respectively held under the supposed warrant of his late Majesty, King William the Fourth, bearing date the 24th April, 1834—viz. next after John Balguy, Esq., who was appointed one of his Majesty's Counsel learned in the Law in Trinity Vacation, 1833.

IN THE COMMON PLEAS.

HILARY TERM, 3 VICTORIÆ.

THE JUDGES WHO SAT IN BANC DURING THIS TERM WERE—
TINDAL, C. J., BOSANQUET, J., ERSKINE, J., AND MAULE, J.

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JOHN PHILIP ADAMS *v.* BUSH and Others.

Saturday,
Jan. 11th.

THE following case was sent by his Honor the Master of the Rolls for the opinion of this court:—

Alexander Adams, being seised of lands, &c., in Stanton Drew, and of a share in the manor of Timsbury and lands thereunto belonging, devised the lands in Stanton Drew to trustees to the use of his wife for life, remainder to the use of his first and other sons in tail, remainder to the use of his daughters as tenants in common in tail, remainder to the use of his sister Elizabeth Lloyd for life, remainder to the use of her daughters as tenants in common in tail, remainder to the use of his uncle George Adams for life, remainder to the use of George Alexander Adams, first son of George Adams, for life, remainder in strict settlement to the use of the issue of George Alexander Adams, remainder to the use of John Philip Adams,

Testator devised lands to G. A. for life, remainder to the use of all and every the child and children of G. A., *other than and except an eldest or only son*, and their heirs, &c., for ever; and if there should be but one such child, other than and except as aforesaid, to the use of such only child, and his heirs; and, if there should be no such child or children other than an elder or only son, or, being

such, all should die under the age of twenty-one, then over. At the time of testator's death G. A. had two sons—G. A. A., and J. P. A.: the first of these died in the lifetime of G. A., the second survived him:—Held, that J. P. A., on his father's death, took an estate in fee-simple in possession, defeasible in the event of his dying under the age of twenty-one.

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second son of George Adams, for life, remainder to the use of the issue of John Philip Adams in strict settlement, remainder in like manner to the use of the third, fourth, fifth, sixth, and all other sons of George Adams, and their issue, remainder to the use of the daughters of George Adams as tenants in common in tail, remainder to the use of such persons as should become entitled to the proceeds of Norton Manor farm thereafter devised.

Demise of the
first moiety of
Timsbury farm.

Of his share of the manor of Timsbury, subject to an annuity of 100*l.* to the widow of his father, the testator devised one moiety to trustees to the use of his uncle George Adams for life, remainder to the use of Elizabeth the wife of George Adams for life, remainder to the use of all and every the child and children of George Adams, *other than and except an eldest or only son*, and their heirs, executors, administrators, and assigns, for ever; and, if there should be no such child or children *other than an elder or only son*, or, being such, all should die under the age of twenty-one, then to the use of such persons as should become entitled to the proceeds of the Norton Manor farm as above.

Second moiety.

The other moiety was devised in a similar manner to the son of Robert Bush for life (his wife was a cousin of the testator), and to his children in succession.

Norton Manor
farm.

Norton Manor farm was devised in a similar manner to Elizabeth Lloyd for life, and her children in tail in succession, and, in default of issue, the estate was to be sold, and the money divided among the children of Robert Bush and George Adams, *other than and except an elder or only son*.

Direction as to
debts and lega-
cies.

The testator, after bequeathing several large legacies, directed in manner following:—"That, in case my personal estate be insufficient to pay my debts and legacies, then I charge my estates, lands, collieries, and other effects at or in Timsbury aforesaid, and given to my uncle George

Adams and my friend Robert Bush, with such deficiency, if any; and I direct the several legacies to be paid to the legatees, within one year after my decease, by my executors hereinafter named, out of my personal estate:" and he appointed his said uncle and Robert Bush joint executors of his will.

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The testator died on the 2nd November, 1811, without issue. The widow of the testator's father is long since dead. Elizabeth Adams, the wife of the testator's uncle George Adams, died in the life-time of George Adams.

Death of testator.

George Adams had issue three children only—George Alexander, his eldest son, who was born in the year 1801—the plaintiff, John Philip, who was born in the year 1802—and a daughter, Elizabeth, who was born in the year 1804.

State of the family.

Elizabeth Adams, the daughter of George Adams, died in December, 1806, in the life-time of the testator and of her father, under age, and without issue; George Alexander Adams was living at the death of the testator, and died in the year 1813, under age, and without issue, in the life-time of his father.

George Adams, the uncle of the testator, died in April, 1819, leaving the plaintiff, John Philip Adams, his only child, him surviving.

The question for the opinion of the court was, whether, under the will of the testator, the plaintiff, John Philip Adams, on his father's death, took any and what estate in the moiety of the premises and hereditaments at Timsbury.

Question.

The case was argued in Trinity Term last.

Talfourd, Serjeant, for the plaintiff.—John Philip Adams, the plaintiff, under the will in question, took, on the death of his father, the tenant for life, an estate in fee-simple in possession in the moiety of the premises at Timsbury. He at the time of the testator's death exactly answered the description in the devise. To entitle the defendants to succeed, they must establish one of two propositions—

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either that the remainder under which the plaintiff takes was contingent, and vested only on the death of the tenant for life; or that it was a vested remainder, liable to be divested in the event of his ceasing to answer the description given in the will. The general rule is, that a remainder vests at the death of the testator, unless an intention to the contrary be plainly expressed: and the reason is obvious, for, if it were otherwise, it would always be in the power of the tenant for life, by making a feoffment or doing any other act to work a forfeiture of his own estate, to defeat the remainders. In *Doe d. Comberbach v. Perryn*, 3 T. R. 484, it was held, that, if an estate be devised to B. the wife of A. for life, remainder to trustees to preserve &c., remainder to the children of A. and B. and their heirs for ever, to be divided among them equally, and if but one child to such only child and his or her heirs for ever; and, *for default of such issue*, remainder over: and at the death of the deviser A. and B. have no child—the estate limited to their children is a contingent remainder in fee, which on the birth of a child will vest in that child, subject to open and let in those who may be born afterwards: and the remainders over will be defeated by that estate becoming vested. Buller, J., there says: “The words ‘dying without issue’ have been frequently held to mean ‘without issue *at the time of the death* of the party’ in cases of personal property, but not in limitations of freehold estates. In *Fonnereau v. Fonnereau*, Doug. 486, Lord Mansfield asked whether there was any such determination in the case of real property, and the counsel agreeing that there was none, the judgment of the court in that case proceeded upon that ground. The reason why this has not been decided in limitations of freehold estates, is, that courts of law always lean in favour of the vesting of estates; and therefore, on such a limitation as the present, they have said that the estate shall vest on the birth of a child, and without waiting for the death of the parents; which rule

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is not attended with any inconvenience to the children, because, where the estate is limited to a number of children, it shall vest in the first, and afterwards open for the benefit of those who shall be born at a subsequent period. But, if this were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to grandchildren : for, if a child were born who died in the life-time of his parents, leaving issue, such grandchild could not take, which could not be supposed to be the intention of the deviser." That case was followed by *Doe d. Willis v. Martin*, 4 T. R. 39. There, by a marriage settlement, lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates &c., as the husband and wife should appoint, and, for want of such appointment, to the use of all and every the child or children equally, if more than one, as tenants in common, and, if but one, then to such only child, his or her heirs or assigns for ever ; remainder over : in the deed was contained a power enabling the settlors to revoke the uses of the settlement, and the trustees to sell the estate and convey it to a purchaser, so as the purchase-money should be paid to the trustees (and not to the settlors) and invested in the purchase of other lands to the same uses : it was held that the remainder to the children was *a vested remainder* in fee, liable however to be divested by an appointment by the parents. So, in *Doe d. Hunt v. Moore*, 14 East, 601, under a devise of real estate in fee to J. M. *when he attains the age of twenty-one*, but, in case he dies before twenty-one, then to his brother when he attains twenty-one, with like remainders over ; it was held that J. M., the devisee, took an immediate vested interest, liable to be divested upon his dying under twenty-one. Lord Ellenborough there says : " The rules by which *legacies* are governed are borrowed all or the greater part from the civil law :

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whereas the decisions on the devises of *real* estate have established a different rule; and, according to them, a devise to *A. when he attains twenty-one*, to hold to him and his heirs, and, if he die under twenty-one, then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him; but the dying under twenty-one is a condition subsequent, on which the estate is to be divested." So, here, there is nothing upon the face of the will to prevent the remainder to John Philip Adams vesting in him at the time of the death of the testator: he was then (his elder brother being living) *other than an eldest or only son* of George Adams, the tenant for life. This case falls precisely within the principle of *Driver d. Frank v. Frank*, 3 M. & S. 25 (in error, 2 Moore, 519, 6 Price, 41). There, the testatrix devised all her real estates to the use of Bacon Frank, the husband of her niece, for life, and, from and immediately after his decease, then to and to the use of the second, third, fourth, and all and every other the son and sons of the body of Bacon Frank by his said wife (except *the* first or eldest son) severally and successively and in remainder one after another, and of the several heirs male of the body of every such son and sons (except the said first or eldest son); and, for default of such issue, to the use of Frank Sotheron, youngest son of another niece of the testatrix, for life, &c.: and it was held that the remainder to the sons of Bacon Frank (who had no children at the date of the will) was not a contingent remainder to such son as should be the second son of Bacon Frank at the death of Bacon Frank, nor a vested remainder in the second or other son of Bacon Frank, liable to be divested by his becoming the first or eldest, by the death of his eldest brother in the life-time of Bacon Frank, but a vested indefeasible remainder in the second or other son of Bacon Frank who should be born living an elder; and therefore, Bacon Frank having had four sons, of whom

the second and third, and second and fourth, were in existence at the same time, but all except the fourth died in the life-time of Bacon Frank without issue—it was held that the surviving son was entitled under the devise. The only difference between that case and the present is in the use of the definite article in the one, and the indefinite in the other. *Stert v. Platel*, 5 New Cases, 434, 7 Scott, 422, is also an important authority to shew the period at which a remainder will vest. Tindal, C. J., there says: “I have always understood the general principle to be, that a remainder shall be construed to be vested at the earliest period at which it can be so held, unless a contrary intention be manifested.” And Coltman, J.: “The general rule is, that a remainder shall vest at the earliest period that is consistent with the expressed intention of the testator.” *Chadwick v. Doleman*, 2 Vern. 528, and *Matthews v. Paul*, 3 Swanst. 328, were cases of personalty, to which the rule does not apply: note to *Windham v. Graham*, 1 Russ. 331.

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R. V. Richards, for the defendant.—The general rule of law, no doubt, is, that a remainder shall be held vested rather than contingent, where there is nothing upon the face of the will to militate against such a construction (106). But the question to be considered in all these cases is, what was the intention of the testator. The testator in this case was possessed of what he has chosen to consider three distinct properties, and he betrays an evident anxiety to keep them distinct—the Stanton Drew estate, and the two moieties of the Timsbury estate. The distinction between the case of *Driver v. Frank* and the present case, is, that there the issue were not in esse either at the date of the will or at the death of the testatrix, so that it was impossible for her to describe the objects of her bounty

(106) See *Doe d. Howell v. Thomas*, 1 Scott's New Rep. 359.

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otherwise than she did ; whereas here, George Alexander Adams and John Philip Adams were both living at the time the will was made, and are described as eldest and second sons of George Adams: the natural course, therefore, would have been to except George Alexander Adams by name if such had been the intention. The language of the exception, too, is somewhat different ; the definite article being used in that case, and here the indefinite. *Matthews v. Paul*, 3 Swanst. 328, is a strong authority in support of the defendants' view. There, under a will directing the transfer of stock among all the children of the testatrix's daughter, except an eldest son ; it was held that a second son having become the eldest living by the death of his elder brother, who survived the testatrix, was not entitled to a share, although an estate limited to his elder brother did not descend to him. "The testatrix," says the Master of the Rolls (Sir John Leach), "was conversant with the state of the family ; in one codicil she makes a gift to Walter Matthews Paul nominatim, as the second son, and must have known, therefore, that he had an elder brother living : if her intention was for any reason to exclude that elder brother John personally, there was no difficulty in identifying him by name : far from that, the testatrix has not even used the words 'the eldest son,' which might have been more descriptive of an individual than in her view, but purposely adopts an expression of indeterminate meaning, 'an eldest son.' The expression is several times repeated, and seems anxiously to mark an intention to exclude, not a particular individual, but an individual who sustains a particular character." [Coltman, J.—You contend that the estate vested in John Philip Adams, subject to be divested. Do you confine the divesting to the period intervening between the death of the testator and the death of the tenant for life?] No. The estate vested in John Philip Adams, subject to be divested upon the contingency that has happened. In *Stert v. Platel*, 5 New

Cases, 434, 7 Scott, 422, the question was treated solely as one of intention.

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Talfourd, Serjeant, in reply.—If the question were solely one of intention, the distinction between devises of realty and bequests of personalty could have no place. Apt words must be employed to carry into effect the intention. "Whatever the intention," says Lord Hardwicke, in *Lomax v. Holmeden*, 1 Ves. Sen. 294, "if there are not words in the will to warrant it, expressed or implied, it cannot have effect." The same doctrine was held by Lord Mansfield in *Fen d. Lowndes v. Lowndes*, 4 Burr. 2246. It is conceded here that the estate in question vested in the plaintiff, John Philip Adams, at the death of the testator; but subject, it is said, to be divested if he, pending the particular estate, should become an eldest or only son. This would make the estate contingent for ever. There is nothing in the will to warrant the notion that the testator intended that the two estates should not unite in the same person: if such had been the intention, what was there to prevent the expression of it? Suppose George Adams, the eldest son, had survived his father, and died without issue, in that case both estates would have become vested in John Philip Adams.

The following certificate was afterwards sent to the Master of the Rolls:—

"We are of opinion, that, under the will of the testator, John Philip Adams, on his father's death, took an estate in fee-simple in possession in the moiety of the premises and hereditaments at Finsbury, defeasible in the event of his dying under the age of twenty-one.

"N. C. TINDAL.

"T. COLTMAN.

"T. ERSKINE."

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KNOCKER v. BUNBURY and Wife, and Others.

Testator, possessed of freehold property, by his will desired his executors to purchase out of such monies belonging to him as might come to their hands, two annuities to be paid by them to certain parties named; and he concluded as follows:—

“And, with regard to *all the rest of my property, of what kind soever*, I do hereby desire my executors, *after payment of my just and lawful debts and funeral expenses, to pay and make over the whole to my daughter, M. D. B., and to the children of my said daughter after her decease*:—Held, that the executors took no interest in the freehold property; but a power to settle the same upon the testator's daughter for life, with remainder, after her decease, to her children in tail.

BY order of his Honor the Vice Chancellor, the following case was submitted for the opinion of this court:—

By an indenture of lease, bearing date the 17th August, 1706, and made between James Butler, therein described, of the one part, and Thomas Bunbury of the other part, the said James Butler granted, demised, and to farm let unto the said Thomas Bunbury all that the town and lands of Cronevonan, containing by estimation four hundred and sixty-one acres, situate in the county of Carlow, in Ireland, as fully and amply as the same were then lately held by John Dillon and his under tenants, with their appurtenances, to hold the same unto the said Thomas Bunbury, his heirs and assigns, during the lives of the several persons therein named; and in the indenture there was a covenant for the perpetual renewal of the lease in the manner and upon the terms therein mentioned.

The lease had from time to time been renewed upon the dropping in of the lives named in the lease and in the subsequent renewals thereof, and by divers meane conveyances and assurances the premises mentioned in the indenture of lease were vested, at the time of the date of the indentures next hereinafter set forth, in Mary Bunbury, for the lives of his Royal Highness Prince Adolphus Frederick, Hugh Mill Bunbury, and Humphrey Freeston, and the life of the survivor of them.

By certain indentures of lease and release, bearing date respectively the 27th and 28th April, 1808, the release made between the said Mary Bunbury of the one part, and Welsh Hamilton Bunbury of the other, for the considerations therein mentioned the said Mary Bunbury gave, granted, released, assigned, transferred, and set over unto the said Welsh Hamilton Bunbury, his heirs and assigns, all the town and lands of Cronevonan described and com-

prised in the indenture of lease of the 17th August, 1706, to hold the same and the said indenture of lease unto and to the use of Welsh Hamilton Bunbury, his heirs and assigns, during the continuance of the said lease for lives, with renewal for ever.

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The said Welsh Hamilton Bunbury, being seised and possessed of the said lands, duly made and published his last will and testament in writing, attested by three witnesses, and bearing date the 30th April, 1833, as follows:—

“I, Welsh Hamilton Bunbury, being at this time in sound mind, do hereby nominate John Halcombe and William Knocker executors of this my last will and testament. I desire my executors to purchase out of such monies belonging to me as may come to their hands, the sum of 100*l.* per annum, to be paid by them to Mrs. Ann Witherington, the widow of the late Colonel Witherington, during the term of her natural life; and I desire them to purchase the further sum of 100*l.* per annum, to be paid in equal portions, during the term of the natural life of each, to the children of the said Mrs. Ann Witherington and of the late Colonel Witherington. And, with regard to all *the rest of my property, of what kind soever*, I do hereby *desire* my executors, *after payment of my just and lawful debts* and funeral expenses, to *pay and make over* the whole to my beloved daughter Mary Diana Bunbury, the wife of Henry Mill Bunbury, of Marlston, Berkshire, and to the children of my said daughter *after her decease*.
Witness &c.”

Will of W. H.
Bunbury.

Residuary
clause.

The testator departed this life shortly after the date of his said will, without having revoked or altered the same, and leaving the said Mary Diana Bunbury, his only child and heiress at law, him surviving.

Death of testa-
tor.

[The following fact was by consent inserted in the case:—“Mrs. Bunbury has had no children.”]

The questions for the opinion of the court were—first, Questions.

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whether the executors of the testator took any and what estate or interest under the will in his said freehold property; and, if not—secondly, whether under the will they had any and what power over the said freehold property.

The case was argued in Trinity Term last.

R. V. Richards for the plaintiff.—Under this will the executors take the legal estate in the lands devised, or at all events a power, to be exercised according to the directions contained in the will. The word “property” is as large and comprehensive as “estate:” and either will suffice to pass lands, unless controlled by subsequent expressions in the will exhibiting a clear intention that that shall not be the effect. None such are to be found here. The testator does not appear to have possessed any personal property: and the executors are directed to pay debts; which of itself is sufficient to give them the legal estate: see the cases collected in 2 Pow. Dev. (by Jarman), c. 34, p. 646. Then, the executors are directed to provide two several annuities—not to be issuing out of the land, but to be purchased by them out of such monies of the testator as may come to their hands. And when he comes to dispose of the rest of his property, he does it in these words:—“And, with regard to all the rest of my property, of what kind soever, I do hereby desire my executors, after payment of my just and lawful debts and funeral expenses, to *pay* and *make over* the whole to my beloved daughter Mary Diana Bunbury, and to the children of my said daughter after her decease.” *Reddendo singula singulis*, the *money* is to be *paid*, and the *estate* to be *made over*. Unless the executors take the legal estate, how are they to carry into effect the direction to make over the property to the testator’s daughter for life and to her children in fee? At all events, they must, in order to do this, be held to have a *power*, to create which no particular form of words is necessary—Sugden on Powers, Ch. 2,

p. 104. *Patton v. Randall*, 1 Jac. & W. 189, will probably be relied on on the part of the defendant: it was there held that a power of sale not expressly given to any one, is not to be implied to the executors, because the devisees of the estate are minors. But there there was an express devise to the testator's children—a circumstance that is wanting here.

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Stephen, Serjeant, contra.—1. There is in this will no devise of the testator's real estate. 2. If the real estate be at all affected by the devise, it is only in the giving a power to the executors to settle it upon Mary Diana Bunbury, the testator's daughter, in tail.

1. That the word "property," unqualified and uncontrolled by other expressions in a will, will pass real estate, may be conceded. Referring, however, to the cases where this has been held, the devise will invariably be found to be, not, as here, a devise of the residue, or a devise to an executor; still less a *direction* to the executor to pay money or to do any other thing. One of the most important of the modern authorities upon this subject is *Doe d. Morgan v. Morgan*, 9 D. & R. 633, 6 B. & C. 512, where Lord Tenterden says: "This is undoubtedly the will of a very unlettered man, and I believe it is not unusual for such men to use the word 'property' as denoting all they are worth in the world, real as well as personal estate; though our decision cannot, of course, be governed by that consideration. It has, however, been decided in many cases, and is established as a principle, that the word 'property' in a will is of itself sufficient to pass real estate, unless there is something in other parts of the will which shews clearly that that word was used in a more confined and limited sense." His lordship there undoubtedly goes further than the exigency of the case required; the question arising between the heir-at-law and the devisee, it was not necessary for the former to shew an absence of in-

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tention in the testator to pass his real estate; it was incumbent on the devisee to shew that which in the older cases is called "declaration plain" of an intention to disinherit the heir. The heir stands untouched in his right, unless a clear and unequivocal intention to oust him is found within the four corners of the will. 2 Pow. Dev. 5. In *Moone d. Fagge v. Heaseman*, Willes, 138, the Lord Chief Justice says: "The rule is, as it is expressly laid down in the case of *Gardner v. Sheldon*, Vaughan, 262, that an heir shall never be disinherited except by express words or such as have a necessary implication. The intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited." In *Doe d. Hick v. Dring*, 2 M. & Sel. 448, Lord Ellenborough uses very nearly the same language. "The rule of law," he says, "is peremptory, that the heir shall not be disinherited unless by plain and cogent inference arising from the words of the will." And Bayley, J., says: "In order to entitle the plaintiff, we must be satisfied that it was the intention of the testator to pass his real property. If that is left in doubt on the face of the will, the necessary consequence is that we ought not to change the possession, and take it from the heir and give it to the devisee." And such also is the language of Sir James Mansfield in *Roe d. Hellings v. Yeud*, 2 N. B. 214: "In cases between the heir and the devisee, the question is, not whether the heir can prove that the testator did not intend to pass real property, but whether the devisee can prove that he did. The proof lies on the devisee." The language used in this will leaves it doubtful whether real estate was intended to pass or not. The devise is of a residue: in the preceding part of the will no mention is made of real estate, but only of personalty; the words "all the rest of my property" can, therefore, only attach on property ejusdem generis with that before alluded to. In *Cliffe v. Gibbons*, 2 Lord Raym. 1324, Lord Cowper, C., held, that, "where a man devises all his *estate*, goods, and

chattels, and no mention had been made before in the will of lands of which the testator was seised in fee, a fee-simple will not pass; but, where a real estate is mentioned before in the will, and then such words follow, a fee passes." So, in *Markant v. Twisden*, 1 Eq. Cas. Abr. 211, Gilbert, 30, the testator, after giving pecuniary legacies only, gave to his wife all the rest and residue of his estate, chattels real and personal; and the Lord Keeper held that the reversion of the lands settled on his wife for life did not pass; for that the rest and residue of his estate must be confined to such estate as he had before given, and that the words "chattels real and personal" explained the word "estate," as if he had said, whether chattels real or personal. In *Roe d. Helling v. Yeud*, 2 N. B. 214, the testator, after directing his debts and funeral expenses to be paid by his executors, and making several bequests of annuities and money, gave to his five grandchildren, whom he appointed executors, "all the remainder of my *property* whatever and where-soever, to be divided equally, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, and demands, or any I may hereafter make by codicil to this my will; all my goods, stocks, bills, bonds, book-debts, and securities in the Witham Drainage in Lincolnshire, and funded property:" and it was held that his real estate did not pass under the residuary clause. "The question here," says Sir James Mansfield, "is, not whether there be not words in the will sufficient to raise doubts, but whether it appears with clearness and certainty that the testator intended to devise his lands to the five residuary devisees. There is no introductory clause in this will indicating an intention of the testator to dispose of his whole property; nor is there one provision throughout the will which has the least relation to real estate. All the debts and legacies are to be paid by the executors and executrixes: there is no express charge of the debts on the real estate." In *Doe d. Bunny*

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v. *Rout*, 7 Taunt. 79, the will was as follows:—"I desire my just debts of every sort, with my funeral expenses, to be paid and properly discharged by my executrix herein-after named; and, subject thereto, I give and bequeath unto my sister A. R. all my stock in trade, household goods, wearing apparel, ready monies, securities for money, and every other thing my *property*, of what nature or kind soever, to and for her own proper use and disposal: and I do hereby appoint her my whole and sole executrix of this my last will and testament." Lord Chief Justice Gibbs, delivering the judgment of the court, says: "The will is executed so as to pass both real and personal estate, and both will pass by the language which is used, if the court can collect a clear intent to convey both, but, if only doubts are raised, they will not disinherit the heir. Mansfield, C. J., in *Roe d. Helling v. Yeud*, lays down the law clearly upon this subject." And the land was held not to pass. The Chief Justice in that case, referring to *Doe d. Wall v. Langlands*, 14 East, 370, says: "There, the will was, 'To R. Doran and E. Wall I give and bequeath all and every the residue of my property, goods, and chattels;' and certainly that case is a full authority that the words 'all my property,' uncontrolled, will carry real estate; and the court of King's Bench thought that the words, goods and chattels, did not confine it to personalty; but the court put it on this ground; they get rid of the difficulty by reading the whole together with the copulative 'and' inserted between 'property' and 'goods and chattels;' this renders the words goods and chattels cumulative, and so reading them it is impossible to contend that they are restrictive. In this case, the position of the words renders it impossible to adopt the same solution of the difficulty." *Doe d. Spearing v. Buckner*, 6 T. R. 610, *Camfield v. Gilbert*, 3 East, 516, *Bebb v. Penoyre*, 11 East, 160, *Doe d. Hurrell v. Hurrell*, 5 B. & A. 18, and *Chapman v. Prickett*, 6 Bing. 602, 4 M. & P. 404, establish, that, where

no previous mention is made of real estate in a will, the words "estate," "effects," "property," or "estate and effects," in the residuary clause, must be referred to personality; particularly where the devise is to executors; and more especially where, as here, it is the subject of mere *direction*.

It has been contended that the real property passes by this will, because it is charged with the payment of debts and funeral expenses: and 2 Pow. Dev. 646, was referred to in support of this proposition. The rule which the learned author of that treatise deduces from a careful review of all the authorities, is, that a general direction by the testator that his debts shall be paid charges them upon the real estate; subject, however, to these two exceptions—first, where, after a general direction, he has provided a specific fund for the purpose—secondly, where the debts are directed to be paid by the *executors*, in which case, unless land be devised to them, it will be presumed that the payment was to be made exclusively out of funds which by law devolve upon them in that character. Where, however, the executor *is* devisee of the real estate, a direction even to *him* (though describing him as such) to pay debts or legacies, will cast them on the realty. 2 Pow. Dev. 653, 654, 657.

It may be conceded that the words here used are sufficient to constitute a power, provided the testator so intended. In Co. Litt. 181. b, it is said: "There is a diversitie between authorities created by the partie for private causes, and authoritie created by law for execution of justice. As, for example, if a man devise that his two executors shall sell his land, if one of them die, the survivor shall not sell it; but, if he had devised his lands to his executors to be sold, there the survivor shall sell it; which diversitie is implied by our author, for he saith that he that surviveth shall have the entire tenancie." In Sugden on Powers, 6th edit. 128, the rule is thus stated: "As far back as the

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reign of Henry the Sixth, it was laid down, in a case in the Year Books (9 Hen. 6. 24 b, 25 a), that, if one devise that his executors shall sell his lands, and die seised, his heir is in by descent, and consequently the executors have only a power; but that, if one devise his land to his executors, there the freehold passes to them by the devise. The same distinction is again taken in the same book. It is said, that, if I devise that certain lands shall be sold by my executors, although my heir is in by descent, and his heir after him, yet the executors may enter upon the heir by descent by reason of the will—11 Hen. 6, 13 b. This distinction, namely, between a devise of lands to *executors to sell*, and a devise that *executors shall sell the land*, is mentioned by Justice Doderidge as a common difference—Latch, 43. So Littleton (§ 169) puts the case of a man devising that his executors may sell his estate, which he treats as a mere power passing no interest; and there-with Sir Edward Coke in his comment agrees. But he says, that, if a man deviseth lands to his executors to be sold, there the estate passes. In a subsequent folio (181. b.), he takes precisely the same distinction, viz. between a devise that *executors shall sell the land*, and a devise *of the land to his executors to be sold*; and in the case of *Houell v. Barnes*, Cro. Car. 382, where the testator *ordered the land to be sold by his executors*, Jones, Berkeley, and Croke resolved that the executors had not any interest by this devise, but only an authority. So, in the modern case of *Yates v. Compton*, 3 P. Wms. 308, a devise that the executors should sell the land was treated as giving them a power only. And in the still later case of *Lancaster v. Thornton*, 2 Burr. 1027, it was in like manner held that a *power* only passed under a *devise*, that, in case of a deficiency of another estate, the testator's two sons and his daughter shall and may absolutely sell, mortgage, or otherwise dispose of his freehold estate for the payment of such of his debts, legacies and funeral expenses as the leasehold

estate should not be sufficient to pay and discharge.'” So, in p. 537 of the same book, it is said that “a power to make partition of an estate will not authorize a sale or an exchange of it ;” which shews how strictly powers of this sort are construed : and see *Woolston v. Woolston*, 1 Sir W. Blac. 281. The court cannot presume that a power was intended to be given, unless they can perceive some reason for it. What reason could the testator here have for giving the executors a power to make over the estate to Mrs. Bunbury for life, with remainder to her children ? The more obvious mode of carrying into effect such an intention would have been, to make a direct devise to that effect.

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2. Where lands are devised to one and to his children, or issue, he having none at the time of the devise, this is an estate tail. In *Wild's Case*, 6 Rep. 16 b, nom. *Richardson v. Yardley*, F. Moore, 397, Goldsb. 139, land was devised to A. for life, the remainder to B. and the heirs of his body, the remainder to “Rowland Wild and his wife, and, after their decease, to their children,” Rowland and his wife then having issue a son and daughter ; and afterwards the devisor died, and after his decease A. died, B. died without issue, Rowland and his wife died, and the son had issue a daughter, and died ; if this daughter should have the land or not, was the question ; and it consisted only upon the consideration what estate Rowland Wild and his wife had, viz. if they had an estate-tail, or an estate for life, with remainder to their children for life ; and the case for difficulty was argued before all the judges of England : and it was resolved that Rowland and his wife had but an estate for life, with remainder to their children for life, and no estate-tail. And “this difference was resolved for good law, that, if A. devises his lands to B. and to his children or issues, and *he hath not any issue at the time of the devise*, that the same is an estate tail ; for, the intent of the devisor is manifest and certain that

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his children or issues should take, and as immediate devisees they cannot take, because they are not in rerum natura, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation, scil. as much as children or issues of his body; for, every child or issue ought to be of the body, and therewith agrees a case, Trin. 4 Eliz., reported by Serjeant Bendloes, where the case was, that one devised land to husband and wife, 'and to the men children of their bodies begotten,' and it did not appear in the case that they had any issue male at the time of the devise; and therefore it was adjudged that they had an estate-tail to them and the heirs males of their bodies: but, if a man devises land to A. and to his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such a case they shall have but a joint estate for life. But it was resolved, that, if a man, as in the case at bar, devises land to husband and wife, and after their decease to their children, or the remainder to their children; in this case, although they have not any child at the time, yet every child which they shall have after may take by way of remainder, according to the rule of the common law; for, his intent appears that their children should not take immediately, but after the decease of Rowland and his wife." In *King v. Melling*, 1 Vent. 214, 225 (107), the testator devised to his son Bernard for his natural life, and, after his decease, to the issue of his body lawfully begotten on a second wife, he having a wife then living. Upon the first argument the court were of opinion that Bernard took only an estate for life. Upon a second

(107) Also reported in 3 Keble, 42, 52, 95; 3 Salk. 296; Pollexfen, 101.

argument, Rainsford and Twisden, Justices, continued of this opinion: but Lord Hale differed. "I agree," he says, "if a devise be made to a man, and after his death to his issue (or children), having issue at the time, they take by way of remainder: and that was the only point adjudged in *Wild's Case*; and there also against the opinion of Popham and Gawdy." He then cites Anderson—"A devise to his son for life, and after his decease to the men children of his body, said to be an estate-tail, and so cited by Coke in that book, and so contrary to his report of it in *Wild's Case*, Bendloes, 30, p. 124." "Again, *Wild's Case*, where lands were devised to A. for life, remainder to B. and the heirs of his body, remainder to Wild and his wife, and after their decease to their children: and the court of King's Bench were at first divided: indeed it was afterwards adjudged an estate for life to Wilde and his wife—first, because, having limited a remainder in tail to B. by express and the usual words, if he had meant the same estate in the second remainder, it is like he would have used the same words—secondly, it was not, after their decease to the children of their bodies; for then there would be an eye of an estate tail—thirdly, the main reason was, because there were children at the time of the devise; and that was the only reason the resolution went upon in the Exchequer Chamber. And, though it be said in the latter end of the case, that, if there were no children at that time, every child born after might take by remainder, it is not said positively that they should take: and it seems to be in opposition to their taking presently." One of the reasons which Lord Hale in that case gives for holding that Bernard took an estate-tail, is, that "it appears by the devise that testator knew there could be no children at that time, and shall not be supposed to intend a contingent remainder." The same disinclination to construe a remainder to be contingent exists at this day—*Driver v. Frank*, 3 M. & S. 25,

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and other cases. Lord Hale's opinion in *King v. Melling*, was afterwards confirmed by the judgment of the Exchequer Chamber—2 Lev. 58—and has ever since been held to be good law. The case cited by Coke in support of his dictum is in truth against it—Anderson, pl. 110: there, "one devised his land to William, his son, for term of his life, and, *after his decease*, to the men children of his body, and, if the said son die without any man child of his body, then the land shall remain to another: the testator died: William, the son, died without issue male of his body: and upon this a question was made what estate he had: the justices of banc held that he had an estate to him and the heirs male of his body." The authority of Anderson is supported by the mention that is made of it in *Seale v. Barter*, 2 B. & P. 485, which is also an authority to shew that this is an estate tail. In *Hodges v. Middleton*, Doug. 481, the testator devised all his real estate in A. to B. during life, and at B.'s death to the children of B., with remainder over: and the court were "inclined to think" that B. took an estate-tail; but they held, that, if she took an estate for life only, her children would take an estate-tail. That case is in point, and is directly in the teeth of the dictum in *Wild's Case*. Lord Chief Justice Willes, in *Ginger d. White v. White*, Willes, 348, appears to confirm *Wild's Case*. He says: "The case of Wild is in point: if a devise be to A. and his children, if there be no children then in being, it gives an estate-tail, because the devise is in words de presenti; and, there being no children in being, they must take by way of limitation. But, if a devise be to A., and, *after his decease*, to his children, A. has only an estate for life, because there the words plainly shew that the children were intended to take by way of remainder." This, however, is a mere quotation from the report of *Wild's Case*: besides, in *Ginger d. White v. White*, the devise was, to the testator's son and daughter, John and Sarah, for life, and, after their de-

cease, or *other* determination of their estate, then to the children of John successively, and their heirs. In *Wharton v. Gresham*, 2 W. Bl. 1083, the devise was to J. W. and his sons in tail male, he then having no child; and it was held, on the authority of *Wild's Case* and the case in *Anderson*, that he took an estate-tail. And in *Seale v. Barter*, 2 B. & P. 485, Lord Alvanley observes upon the same cases, and founds his decision on them and on *King v. Melling*. Mr. Jarman (2 Pow. Dev. 502) says that it is now admitted on all hands (but for this he gives no authority) that a devise to A. and his wife, and, *after their deaths*, to their children, gives an estate for life to the parents, with remainder to the children for life. He appears, however, in p. 495, n. (2), to rely on *Doe d. Davy v. Burnsall*, 6 T. R. 30, *Burnsall v. Davy*, 1 B. & P. 215, and *Doe d. Gilman v. Elvey*, 4 East, 313, which scarcely maintain his position.

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Richards, in reply.—No authority has been cited to contravene the doctrine of Lord Tenterden in *Doe d. Morgan v. Morgan*, 9 D. & R. 633, 6 B. & C. 512, that the word "property" in a devise will include real estate, unless other parts of the will shew a clear intention in the testator to the contrary: nor is there any pretence for assigning to "property" a different signification in a residuary clause from that which it bears when used in the earlier part of a will. In 2 Pow. Dev. 159, it is said that *Cliffe v. Gibbons*, 2 Ld. Raym. 1824, is inconsistent with *Doe d. Wall v. Langlands*, 14 East, 370, and *Tanner v. Morse*, Cas. Temp. Talb. 284; and that no case has gone so far in restraining the word "estate" as *Markant v. Twisden*, 1 Eq. Cas. Abr. 211. In *Camfield v. Gilbert*, 3 East 516, the devise of "all the rest, residue, and remainder of my *effects*, wheresoever and whatsoever, and of what nature, kind, or quality soever," was preceded only by bequests of personality; and the word "*effects*," though it may sometimes

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carry real estate, is not by any means so potent as "property:" besides, the exception in that case of the testatrix's wearing apparel and plate tended to shew that she had personalty only in her contemplation. In *Bebb v. Penoyre*, 11 East, 160, the testator, after giving several pecuniary bequests, *ordered* the lease of his house, &c., to be sold, and all the rest and residue to be divided, &c., without naming the parties by whom this direction was to be carried into effect: he must, therefore, as Lord Ellenborough observes, have meant his executors, and consequently the words "rest and residue" so standing and so accompanied must be taken to denote property of a nature similar to that before mentioned, viz. personalty. *Roe d. Helling v. Yeud*, 2 N. R. 214, turned on the particular expressions used in the will: and, speaking of that case, Lord Ellenborough says, in *Doe d. Wall v. Langlands*, 14 East, 370: "We think this case distinguishable from *Roe d. Helling v. Yeud*, in C. B., where the bequest was to five persons whom the testator made his executors, and where the enumeration at the end of the will was very particular, and was considered by the court as incapable of meaning anything but an enumeration of what the testator supposed to be included in his bequest. The clause in that case specified goods, stock, bills, bonds, book-debts, securities, and funded property: and if it were so incapable of being understood otherwise than as enumerating what he meant to include in his expression of *property* (and which that court appears to have thought), the conclusion was necessary, that personal property only could pass." In *Doe d. Bunny v. Rout*, 7 Taunt. 79, Gibbs, C. J., observes: "There is no case decided on similar words to guide us; therefore we must form our own judgment of the meaning of the words—" clearly confining the decision to the words of the will before the court. In *Doe d. Spearing v. Buckner*, 6 T. R. 610, the testator having given 4,000*l.* to A. and B., in trust for certain persons, by a residuary clause gave

"all the rest of his estate and effects of what nature soever to A. and B., *their executors and administrators*, in trust to *add the interest to the principal*, so as to accumulate the same, it being his will that the residue should not pass but at the time and manner as the principal sum of 4,000*l.* was directed to be paid:" and Lord Kenyon relies on these words, *to add the interest to the principal*, saying: "The interest and principal were to make one consolidated sum of the same nature; but these are terms wholly inapplicable to a real estate." The conclusion arrived at by Abbott, C. J., in *Doe d. Hurrell v. Hurrell*, 5 B. & A. 18, was the result of an examination of the words of the will, whence the court inferred that the testator did not intend that his real estate should pass. *Chapman v. Prickett*, 4 M. & P. 404, 6 Bing. 602, also turned upon the peculiar construction of the will. The sole question here is, whether there is enough upon the face of the will to enable the court to see that the testator intended to pass his real estate by the devise to the executors. They are directed to pay debts, and it does not appear that there was any personalty available for that purpose: the debts, therefore, are charged upon the real estate, and, if so, according to all the authorities, the executors take it. There is no previous mention of any particular description of property, but simply a direction *to the executors* to make over the rest of the testator's property, after payment of his debts, and the purchase of two annuities, to his daughter.

Very little reliance can be placed upon *King v. Melling*. Speaking of that case, Lord Hardwicke, in *Lethicullier v. Tracey*, Ambler, 220, is reported to have said: "It is a great misfortune there is no report of that case by Lord Hale himself, or of his own argument, for, though the cases there cited are often mentioned by judges, yet there is no certainty of the correctness of the report." And in the same case in 3 Atk. 796, his lordship is made to say: "I cannot help saying that it is a great misfortune to

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Westminster-Hall that there is no report of Lord Chief Justice Hale himself of the case of *King v. Melling*, nor any copy of his argument, for it is very imperfect in Ventris, especially as to the cases said to have been cited by Hale."

If, therefore, the executors took no estate, but a power only, it must, in order to carry into effect the object the testator had in view, be held to be a power to convey to Mary Diana Bunbury an estate for life, with remainder to her children in tail.

The following certificate was afterwards sent :—

" We are of opinion, first, that the executors of the testator, W. H. Bunbury, took no interest under the will of the said testator in his said freehold property. But, secondly, that under the will, they have a power to settle the said freehold property upon the daughter of the testator for life, with remainder, after her decease, to her children and their heirs.

" N. C. TINDAL.

" T. COLTMAN.

" T. ERSKINE."

THE SERJEANTS' CASE.

Exclusive privilege of the Serjeants.

A PETITION, of which the following is a copy, was, in the month of June, 1837, presented to the Lord Chancellor by the Serjeants whose names are subscribed thereto, with a request that his lordship would lay it before her Majesty; with which request his lordship was pleased to comply :—

" To the Queen's most Excellent Majesty, the humble Petition of the Undersigned,

" Sheweth :

Petition to her Majesty.

" That your Petitioners have for many years past held the state and degree of Serjeants at Law.

" That, for a period as far back as written records extend, the exclusive privilege of practising, pleading, and audience, during Term time, in your Majesty's court of

Common Pleas at Westminster, has been enjoyed by the Serjeants at Law.

“ That Serjeants at Law are created by writs of the Kings and Queens of this realm, issued by the advice of their Council; and the persons to whom such writs are directed, though now usually applying for the same, are still, according to the antient precedents, commanded by the Crown to take on themselves the state and degree of Serjeants at Law. And no persons can be Judges of the superior courts of common law, until they have, under such writs, taken on themselves this state and degree.

“ That this degree, and the prescriptive privilege of practising at the bar of the court of Common Pleas, incident thereto, have been continued from the most early times, as conducive to the due administration of justice in this court, and have been preserved in the greatest convulsions of public affairs.

“ That, on the 25th day of April, 1834, a mandate, under the sign-manual of His late most Gracious Majesty King William the Fourth, was transmitted to the Lord Chancellor (108), and by him communicated to the Lord Chief Justice (109), and the other Justices (110) of the court of Common Pleas, containing as follows :—

“ ‘ WILLIAM R.

“ ‘ Whereas it hath been represented to Us, that it would tend to the general dispatch of the business now pending in our several courts of Common Law at Westminster, if the right of counsel to practise, plead, and be heard, extended equally to all the said courts; but such object cannot be effected so long as the Serjeants at Law have the exclusive privilege of practising, pleading, and audience during Term time in the court of Common Pleas at Westminster; We do therefore hereby order and direct,

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Warrant of
April, 1834.

(108) Lord Brougham.

lee, Sir J. B. Bosanquet, and Sir J.

(109) Sir N. C. Tindal, Knt.

Vaughan, Knts.

(110) Sir J. A. Park, Sir S. Gase-

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that the right of practising, pleading, and audience in our court of Common Pleas, during Term time, shall, upon and from the first day of Trinity Term now next ensuing, cease to be exercised exclusively by the Serjeants at Law, and that, upon and from that day, our counsel learned in the law, and all other Barristers at Law, shall and may, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience in the said court of Common Pleas at Westminster, with the Serjeants at Law (111). And we do hereby will and require you to signify to Sir Nicolas Conyngham Tindal, Knight, Our Chief Justice, and his companions, Justices of Our said court of Common Pleas, this our Royal will and pleasure, requiring them to make proper rules and orders of the said court, and to do whatever may be necessary to carry this purpose into effect.'

"That the said mandate bears only the sign-manual of His late Majesty, is not sealed with any seal or signet, and is not countersigned by any known public officer.

"That your Petitioners beg most humbly to represent to your Majesty that the said mandate is illegal, inasmuch as it purports to alter the constitution and practice of one of the superior courts of justice, by the authority of the Crown alone.

"That, on this account, as well as from the said man-

(111) The mandate contained also a provision as follows: "And whereas We are graciously pleased, as a mark of Our royal favour, to confer upon the Serjeants at Law hereinafter named, being Serjeants at this present time in actual practice in Our said court of Common Pleas, some permanent rank and place in all Our courts of law and equity, We do hereby further order and direct, that Vitruvius Lawes, Thomas D'Oyley, Thomas Peake, William St. Julien Arabin, John

Adams, Thomas Andrews, Henry Storks, Ebenezer Ludlow, John Scriven, Henry John Stephen, Charles Carpenter Bompas, Edward Goulburn, George Heath, John Taylor Coleridge, and Thomas Noon Talfourd, Serjeants at Law, shall from henceforth, according to their respective seniority among themselves, have rank, place, and audience in all Our courts of law and equity, next after John Balguy, Esq., one of Our Counsel learned in the law."

date not being countersigned by any responsible officer, there is reason to believe that His late Majesty King William the Fourth was surprised in giving His signature to the said mandate.

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"That the prescriptive privilege of the Serjeants at Law cannot be abrogated by any authority but that of an act of parliament.

"That Your petitioners had no opportunity of being heard, before the said mandate was acted upon, and that they have not hitherto brought its validity under discussion, from deference to the authority by which it was promulgated.

"That an opportunity has thereby been afforded of judging whether any benefit has accrued to the public from the alteration.

"That Your Petitioners beg most humbly to represent to Your Majesty, that experience has shewn that the benefit of the greater dispatch of business, expected to accrue to the public from the alteration, has not been realized.

"That, as the accession of Your most Gracious Majesty to the throne of Your ancestors imposes upon those who are to act under the said mandate, the necessity of considering its original validity, as well as whether it can have any effect since the demise of His late Majesty, Your Petitioners, being all the Serjeants at Law who have not taken rank under the said mandate, most humbly solicit Your Majesty's gracious attention to the important exercise of the Royal Prerogative by His late Majesty, in issuing the document dated the 24th day of April, 1834; and that Your Majesty will be pleased to cause the legality and expedience of the said document to be duly investigated, under Your Majesty's most gracious sanction and direction.

"And Your Petitioners will ever pray, &c.

(Signed) "W. TADDY. "D. F. ATCHERLEY.
"T. WILDE. "H. A. MEREWETHER."
"R. SPANKIE.

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This petition was referred by her Majesty to the Judicial Committee of the Privy Council, before whom the petitioners were heard by their counsel, *Sir W. Follett* and *Austin*, on the 10th January and 2nd February, 1839. The members present were—The Marquess of Lansdown, P., Lord Cottenham, C., Lord Wynford, Lord Brougham, Lord Denman, C. J., Lord Langdale, M. R., Sir L. Shadwell, V.C., Lord Chief Justice Tindal, Lord Abinger, C. B., Parke, B., Vaughan, J., Bosanquet, J., Erskine, J., and Dr. Lushington.

The Attorney and Solicitor General (Sir J. Campbell and Sir R. M. Rolfe), were heard in support of the warrant: and after the matter had been argued at great length, and with much display of learning and ingenuity on both sides, the court adjourned without giving any judgment. It was, however, generally understood that the *illegality* of the warrant of the 24th April, 1834, was admitted: indeed, the only ground upon which it was attempted to be supported was, that the Judges, by adopting it, had made the opening of the court their own act, and that the Serjeants, having so long acquiesced in it, were now precluded from taking any objection.

Saturday,
Nov. 2, 1839.

Wilde, Serjeant, on behalf the petitioners, on this day addressed the court to the following effect:—

My Lords—On behalf of my learned Brothers Taddy, Spankie, Atcherley, Merewether, and myself, I have to call your lordships' attention to the departure that has recently take place from the antient course and practice of this court, and the violation, as we conceive, of the constitution of the court itself. Your lordships will have anticipated that I refer to the course which has lately obtained of allowing members of the bar generally to address the court in banc. My learned Brothers and myself have judged the present to be the fittest moment to call the attention of your lordships to the subject, and respectfully,

but earnestly, in the name of the constitution and of the law, to protest against that course being persevered in.

It will be in your lordships' recollection, that, in the month of April, 1834, a warrant under the sign manual of his late Majesty was sent to the judges of this court, commanding them to open it to the bar generally. Until the morning on which that warrant was read in court, the Serjeants were ignorant of its contents or form: they had received no intimation on the subject; and, although they were aware that some measure of the kind was contemplated, they were ignorant of the manner in which it was to be carried into effect until they heard the warrant itself read in court. Your lordships, upon receiving the Royal mandate, thought at the moment, without bestowing further consideration upon the subject, that you were bound to obey it; and accordingly it was ordered to be recorded, and gentlemen not of the degree of the coif were called upon to move. The Serjeants, however, entertained at the time a strong opinion that the warrant was illegal, and that any such interference on the part of the Crown with the antient and established practice of the court, was an unconstitutional exercise of the Royal prerogative; but they deemed it more respectful and proper to forbear to give utterance to that opinion until they should have thoroughly satisfied their minds upon the subject. Moreover, they were ignorant as to how far the judges of this court had countenanced or were parties to the obnoxious measure. In short, the document came by surprise upon the bar of this court, and therefore they forbore on the instant to interfere on the subject, notwithstanding their strong opinion of its illegality. In this opinion they were confirmed by that which took place in the year 1755, when one of the learned judges of that day had suggested the expediency of partially opening the court to general practitioners. To effect this a bill was prepared, to be introduced into parliament—which shews the opinion that

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then prevailed, that nothing short of an act of the legislature could so utterly subvert the established practice of the court. This bill was ultimately abandoned, the interests of the public not being considered to call for such a measure. When the bill for establishing the Central Criminal Court was before parliament, it was proposed to insert a clause for the purpose of effecting a portion of that which was afterwards done by the Royal warrant (112): this furnishes an additional proof of the conviction which prevailed, that the authority of the legislature was necessary for effecting any change in the constitution of the court. So recent a recognition of this principle necessarily precluded all anticipation of any attempt to do this by the mere force of a warrant under the sign-manual. We cannot but think that your lordships were equally taken by surprise, and were placed in the dilemma of either hesitating to act in obedience to a communication from the Crown which might well have been supposed to have been the result of sound deliberation and competent advice, or of acting without having had an opportunity of forming your own judgment respecting its legal validity. Your lordships, accrediting that document at the moment, acted upon it, directed it to be read in court and recorded, and, in obedience thereto, permitted gentlemen not of the degree of the coif to act as advocates in this court during term time, which they still continue to do.

The Serjeants had to consider whether or not this warrant was a legal document. Besides which, my learned Brothers for whom I appear, and myself, held patents from the Crown, and, as officers of the Crown, were bound in an especial manner to pay obedience to the Royal authority. When, therefore, we were convinced that that authority had been illegally exercised, we had to consider what would be the most proper and respectful manner of

(112) See Manning's Serjeants' Case, Appendix, p. 175.

making our sentiments known to the Crown. My Brother Taddy, in a subsequent term, intimated to the Court his intention to address your lordships on the subject of the King's warrant. Upon further consideration, however, it was deemed more respectful to present a memorial to the Crown, not for the recal of the warrant, but praying her Majesty to take proper means to inquire into the legality and expediency of that document. The Crown was pleased to refer the matter to the Judicial Committee of the Privy Council, before whom it was very elaborately discussed. Three of the learned judges whom I have now the honor of addressing were present at that discussion. There was also present another of the members of this court, Mr. Justice Vaughan, whose recent loss we all deplore. The Crown was ably represented by the Attorney and Solicitor-General. But, during the whole course of the discussion (which lasted two days), not a suggestion was offered in assertion of the legality of the warrant. The law officers of the Crown unhesitatingly expressed their opinions that the warrant was not binding upon the court of Common Pleas, that the Chief Justice and the other judges were not at all bound to act upon it, and that they did not find any principle, authority, or precedent that could support it as an obligatory instrument. (113) And Lord Abinger observed, "I must own that I formed an opinion at the time, that it was a very illegal proceeding, taking away the exclusive privilege of the antient practitioners of a court of justice." (114)

The Crown having thus, by its responsible advisers, admitted the illegality of the warrant as a document conferring upon the judges of this court a power to deal with the privileges of the Serjeants and the constitution of the court in the manner they had felt themselves bound to do

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(113) See *The Sergeants' Case* by Manning, pp. 119, 147.

(114) *Ib.* 154.

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in pursuance of that warrant, the discussion took a different shape. No formal judgment was pronounced.

This duty of respect to the Crown being discharged, we now beg to call the attention of your lordships to the matter, and pray that the proceedings of the court may in future be conducted agreeably to the course of the common law. We were aware, that, some time having elapsed, and gentlemen not of the degree of the coif having been retained in causes pending in the court, an immediate return to the antient course of practice might be attended with inconvenience to the suitors: we were also aware that a bill was about to be introduced into parliament for the purpose of opening the court wholly or partially to the general bar: we therefore abstained from troubling your lordships. A bill was brought into the House of Lords by the Lord Chancellor (115)—a measure that would have

(115) The following is a copy of this bill as transmitted to the Commons:—

“A Bill to regulate the course of proceeding in the court of Common Pleas, so far as relates to the practice and hearing of counsel herein, whilst the same court is sitting in banc.

“Whereas it is expedient to regulate the course of proceeding in her majesty's court of Common Pleas at Westminster, so far as relates to the exclusive privilege of Serjeants at Law to practise and be heard therein whilst the same court is sitting in banc: Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that, from and after the

passing of this act, in all motions already pending or which shall be made in the said court touching the trial of any cause or issue which has been or shall have been tried at the Assizes holden for any county, city, or place, other than London or Middlesex, by virtue of any writ of Nisi Prius; and also in all such motions touching the execution of any writ of inquiry before any judge at the Assizes in the country; and also upon all such motions touching the execution of any writ of inquiry directed to any sheriff or sheriffs of any county, city, or place whatever, or any writ of trial directed to any such sheriff or sheriffs, or to any judge of an inferior court of record; it shall be lawful for any barrister or barristers at law, not being of the degree of the coif, who was or were actually engaged or concerned and

been uncalled for had the warrant of 1834 been considered defensible. This bill passed the House of Lords with but little observation. It was sent down to the Commons, where it was neglected, and perished.

Thus, the law officers of the Crown have abandoned the warrant, have admitted it to be illegal. The legislature have had an opportunity to consider the expediency of opening the court: they have not thought fit to avail themselves of it. The Serjeants conceive that they have done all that their peculiar position and the respect they owed to the Crown demanded of them: and they now humbly and respectfully call upon the court to vindicate its honour and its antient constitution, and to act in accordance with the statutes (116) and their own oath (117).

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present on the occasion of such trial or inquiry, according to their respective ranks and seniority, to have and exercise equal right and privilege of practice, pleading, and audience in the said court of Common Pleas with the Serjeants at Law, whilst the said court is sitting in banc, as well in respect of making and supporting as of opposing such motions as are hereinbefore mentioned: Provided always, that nothing herein contained shall prevent any such barrister or barristers at law from carrying on and bringing to a conclusion any other matter of law or business pending in the said court of Common Pleas, in which he or they were already engaged at the time of passing this act, in the same manner as if this act had not been passed.

"And be it further enacted, that nothing contained in this act, or in any warrant from the Crown, or any order of the said court in that respect heretofore made, shall have

the force or power of opening the said court of Common Pleas to the practice therein by barristers at law, not being of the degree of the coif, in any other manner or to any other extent than is hereinbefore specified and contained."

(116) 2 Edw. 3, c. 8. "Item, it is accorded and established, that it shall not be commanded by the Great Seal nor the Little Seal to disturb or delay common right; and though such commandments do come, the justices shall not therefore leave to do right in any point."

14 Edw. 3, st. 1, c. 14. "And that, by commandment of the Great Seal or Privy Seal, no point of this statute shall be put in delay; nor that the justices, of whatsoever place it be, shall let to do the common law by commandment which shall come to them under the Great Seal or Privy Seal."

20 Edw. 3, c. 1. "We have commanded all our justices that they shall from henceforth do equal law

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The rank of Serjeant is as antient, and depends upon the same principles, as the authority of the judges. No

and execution of right to all our subjects, rich and poor, without having regard to any person, *and without omitting to do right for any letters or commandment which may come to them from us*, or from any other, or by any other cause. And if that any letters, writs, or commandments come to the justices, or to other deputed to do law and right according to the usage of the realm, in disturbance of the law, or of the execution of the same, or of right to the parties, the justices and other aforesaid shall proceed and hold their courts and processes, where the pleas and matters be depending before them, as if no such letters, writs, or commandments were come to them; and they shall certify us and our council of such commandments which be contrary to the law, as afore is said."

11 Ric. 2, c. 10. "It is ordained and established that neither letters of the signet, nor of the King's Privy Seal, shall be from henceforth sent in damage or prejudice of the realm, *nor in disturbance of the law.*"

(117) 18 Edw. 3, stat. 4 (1344).
 "Ye shall swear, that well and lawfully ye shall serve our lord the king and his people in the office of justice, and that lawfully ye shall counsel the king in his business, and that ye shall not counsel nor assent to anything which may turn him in damage or disherison by any manner, way, or court. And that ye shall not know the damage or disherison of him, whereof ye

shall not cause him to be warned by yourself, or by other; and that ye shall do equal law and execution of right to all his subjects, rich and poor, without having regard to any person. And that ye take not by yourself, or by other, privily nor apertly, gift nor reward of gold nor silver, nor of any other thing which may turn to your profit, unless it be meat or drink, and that of small value, of any man that shall have any plea or process hanging before you, as long as the same process shall be so hanging, nor after for the same cause. And that ye take no fee as long as ye shall be justice, nor robes of any man great or small, but of the king himself. And that ye give none advice or counsel to no man, great nor small, in no case where the king is party. And in case that any of what estate or condition they be come before you in your sessions with force and arms, or otherwise against the peace, or against the form of the statute thereof made, to disturb execution of the common law, or to menace the people that they may not pursue the law, that ye shall cause their bodies to be arrested and put in prison; and in case they be such that ye cannot arrest them, that ye certify the king of their names, and of their misprison, hastily, so that he may thereof ordain a convenable remedy. And that ye by yourself nor by other, privily nor apertly maintain any plea or quarrel hanging in the King's court, or elsewhere in the country. And *that ye deny to n_o*

evidence can be found of the existence of this court and the authority of its judges, unless coeval with the existence and the privileges of the Serjeants. The office of Serjeant is as antient as the law itself. As members of an antient court of Justice, honoured with a certain relation to, or connection or title in common with the judges, the Serjeants, independently of any question of personal privilege, considered that an attempt to alter the constitution of this court by an exercise of the Royal prerogative, imposed upon them the duty of seeing, that, if it were proper that the court should be opened, it should be done legally and constitutionally, and not by a precedent that went to shake the foundation and constitution of every court in Westminster-Hall, and throughout the country. They act upon that principle now: but they have the satisfaction to perceive that the views that led the learned judges in 1755, to counsel the abandonment of the measure then in agitation, under the impression that public convenience did not call for it, have been confirmed by recent experience. Every court in Westminster-Hall, both of law and equity, is struggling to maintain a separate and independent bar: professional men are agreed upon its expediency: but, in the face of this, in this court, which has always had a separate bar, it is proposed to create the very evil that is universally deplored. I appeal to the experience of your lordships and of my learned friends who hear me, if, during the period of innovation, the convenience of the public has been found to be in any degree promoted. We have the satis-

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man common right by the King's letters, nor none other man's, nor for none other cause; and, in case any letters come to you contrary to the law, that ye do nothing by such letters, but certify the King thereof, and proceed to execute the law notwithstanding the same letters. And that ye shall do and procure the

profit of the King and of his Crown with all things where ye may reasonably do the same. And, in case ye be from henceforth found in default in any of the points aforesaid, ye shall be at the King's will of body, lands, and goods, thereof to be done as shall please him, as God you help and all saints."

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faction of applying to your lordships to resume the antient legal and constitutional course of practice, with the knowledge which that experience has given us that it is the course that best meets the wants and the convenience of the suitors. If we are desired to wait, I ask, for what? Is it fitting that we should pray her Majesty to recall the abandoned warrant? As a member of the court, as one who feels bound to maintain its integrity and honor, and devoted to the constitution, I should deem such a course degrading to the court.

The illegality of the warrant is admitted on all hands. Your lordships are required by acts of parliament, as early as in the reign of Edward the Third, to attend to no letters or commandments from the Crown, whether under the great or the privy seal, in disturbance of the law, or of the execution of the same, or of right to the parties. I therefore call upon your lordships for the future to hold the court according to antient usage and to the statutes the judges are sworn to observe. The Crown is satisfied, that, in issuing that warrant, it was ill advised. Will the court continue to act upon it, until her majesty may be advised to recall it, as being an illegal and an unconstitutional act of her royal predecessor? To do so would be to uphold an illegal exercise of the prerogative, which none would desire to see, instead of vindicating the authority of the law. Your lordships cannot but be aware who was the noble and learned person who held the Great Seal at the time the warrant in question issued: and your lordships cannot have a safer or more constitutional guide than the public declaration of that noble and learned lord when this matter was under discussion before the Judicial Committee of the Privy Council. "I think," said Lord Brougham (118), "the most

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respectful course for all courts and for all judges to take towards the Crown, as well as towards the subject, is, to do their duty, and to treat an illegal order as a nullity, if they only do it legally, and not to wait till the Crown shall revoke the order." The Crown can have no other desire than that the law should be administered properly.

No rank, no dignity, no office in the kingdom is based upon a better or more antient title than that of a Serjeant. If the rights and privileges of their order, which form part of the office itself, can be destroyed by the mere act of the Crown, the peerage, and every office of honor or dignity in the kingdom, are at the mercy of the Crown. Their security in the present day is not the consideration: the law looks to that which may come in the day of evil.

Inviting your lordships' attention to the terms of the statutes that have been referred to, and of the oath taken by each of your lordships upon your elevation to the judicial seat, and to the fact of the warrant being abandoned by the legal advisers of the Crown, we humbly and respectfully pray of your lordships to treat that warrant as a nullity, and to cause the business of the court to be conducted, as formerly, by the Serjeants alone—always bearing in mind, that the power that opens a court may at any time assume to close it, and that times less peaceful than the present may arise when such a precedent may work mischief.

If your lordships think, that, by any waiver or consent on the part of the Serjeants, gentlemen not of the degree of the coif who are already engaged in causes that are pending in the court, can be permitted to carry them through to their conclusion, they are willing to acquiesce; though they cannot fail to perceive the danger of such a precedent.

TINDAL, C. J., after a short conference with the other

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judges who were present, said—"The subject-matter of the application is one of very deep importance, both as regards the constitution and practice of the court, and the interests of the public. It therefore requires serious consideration. We shall give it our earliest and best attention, and will inform the bar as to the course we may deem it just and expedient to take. In the meantime, it is hardly necessary to say that the practice of the court must continue as of late."

Cur. adv. vult.

Monday,
 Nov. 25, 1839.

TINDAL, C. J., addressing himself to the senior Queen's Serjeant present, Spankie, said:—With respect to an application made to the court on the first day of the present term by my Brother Wilde, upon the subject of the exclusive privilege of the Serjeants to be heard and to practise in this court during term time, notwithstanding the warrant of the 24th April, 1834, under the Royal sign-manual, we have given the matter very full consideration, and have resolved upon the course we intend to pursue.

On the first day of the next term, or, in case, from particular circumstances, I shall then be absent, on an early day after my return (119), should any gentleman of the bar not of the degree of the coif be present in court, I shall not call upon him to move: but, if the gentleman so passed over shall be disposed to offer any observations as to the right of himself and other baristers, not being of the degree of the coif, to be heard, we shall be ready to hear him, and to receive any information upon the subject; and either then, or, in case the observations we may hear require further consideration, then upon some future day, we will declare the course we think it right to pursue, and the reasons upon which our determination is founded.

(119) His lordship was about to proceed to Monmouth for the trial of Frost, Williams, and Jones, for high treason.

Kelly, Q. C., in the course of the day, inquired whether, in the event of the antient practice of the court being restored, it was in the contemplation of the court to make any provision with respect to matters now pending.

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pending.

TINDAL, C. J.—The circumstance of counsel other than those of the degree of the coif having been *instructed* in causes now pending, has not escaped our attention. We will do that which we think just.

On Monday, the 20th January, 1840, the first day in the term upon which the Lord Chief Justice presided, his lordship, pursuing the course announced in the judgment delivered by him on the 25th November last, called upon the Serjeants only to move; and then directed the Master to call on the New Trial Paper: but his lordship observed that counsel not of the degree of the coif would still be permitted “to carry through all business in which they might be already *engaged*.”

Monday,
Jan. 20th.

At the close of the same day—

Newton, a member of the outer bar, claimed to be heard in assertion of his right to practise in the court of Common Pleas at the sittings in banc. The Court intimating their willingness to hear him, he proceeded in substance as follows:—

Newton's appli-
cation.

The exclusive rights and privileges claimed by the Serjeants, being conferred on them by Royal mandate in the form of a writ, stand upon no higher a ground than the rights of those members of the outer bar who have practised in this court since the warrant of April the 24th, 1834, came into operation. That warrant was received by your lordships, and ordered to be recorded: and in obedience to

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it the right of pleading and audience was extended to the bar generally and without restriction. The Serjeants themselves acquiesced in that proceeding, and no question was raised as to the legality of the warrant during the life-time of the sovereign from whom it emanated. But, when her present Majesty ascended the throne, they preferred a petition to the Crown praying it to be advised in the matter. This petition was referred by her Majesty to the Judicial Committee of the Privy Council: but, as it did not produce the desired result, a bill passed through the House of Lords, not, as has been said, for *opening* the court, but (the court being then open) for the purpose of *closing* it to a certain extent. But, though this bill passed through the House of Lords, not a single member of the popular branch of the legislature could be found to advocate the measure. The course then adopted by the learned Serjeants, was, to apply to the court to do that of their own authority which the legislature had not thought fit to do—suggesting, that, in issuing the obnoxious warrant, the Crown had exceeded its Royal prerogative, and that the court had, in acting upon that warrant, improvidently invaded their antient rights and privileges. The Serjeants claim to enjoy these rights and privileges by virtue of the Royal mandate by which they are created. [*Tindal*, C. J.—The Serjeants receive their rank not by virtue of any Royal warrant or mandate, but by writ under the Great Seal.] There is for this purpose no substantial difference between a writ and a mandate: they are, or ought to be, of equal force and authority. With regard to those who have been called to the bar during the period when the right of pleading and audience was not confined to the Serjeants, the course now pursued is particularly unjust: many of those gentlemen may have bestowed time and expense upon the acquirement of that description of learning which is peculiar to this court. The universal impression is against the continuance of the monopoly; and there can be no doubt

that it is to the interest and convenience of suitors that their causes should be advocated by whomsoever they may choose. Though I have little hope that anything I can urge would weigh with your lordships, I cannot refrain from intreating your lordships to pause before you finally resolve to do that which neither the legislature nor the Crown has thought it consistent with the interests of the public or the advancement of justice to do.

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TINDAL, C. J.—The observations you have made are extremely proper, and shall receive due consideration.

On the following day, the determination of the court, and the grounds on which it proceeded, were given by—

Tuesday,
Jan. 21st.

TINDAL, C. J.—A question has been raised before us as to the validity and legal effect of a warrant under the sign-manual of his late Majesty (the warrant itself being subject to some exception in point of form, to which, however, it is unnecessary further to advert), ordering and directing that the right of practising, pleading, and audience in the court of Common Pleas during term time should, from the first day of Trinity Term, 1834, cease to be exercised exclusively by the Serjeants at Law, and that, upon and from that day, the barristers at law might have and exercise equal right and privilege of practising, pleading, and audience in the said court with the Serjeants at Law; and we have been called upon by such of the learned Serjeants as have joined in the application, to declare our opinion upon a question which affects so nearly their privileges and interests, and to act upon such opinion.

Opinion of the
court.

At the time when this warrant from his late Majesty was openly read in court in the presence of all the Serjeants, if any one of our learned brethren had expressed a doubt as to its validity or legality, and had called for the

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opinion of the court upon that point, we should have felt it our duty to have paused before we gave effect to the warrant, and should have given our deliberate opinion upon the objections which might have been urged in argument against it. But no doubt whatever was then suggested; indeed, the larger number of the Serjeants accepted under the warrant the grace and favour of the Crown in giving them permanent rank with respect to any gentlemen who should be afterwards appointed King's Counsel; and those of our Brethren who had previously obtained permanent rank from the Crown, and who are the only parties to the present application, allowed the matter to pass at that time sub silentio. Under these circumstances, it cannot be matter of surprise that the court did not of its own authority interpose any objection to the warrant; the more especially as the object which the warrant had in view, that is, the opening of the court of Common Pleas, was that which the Common Law Commissioners had by their Report previously recommended to be adopted, for the benefit of suitors; though certainly with a much closer limit as to extent than the warrant directs.

Still, however, notwithstanding the period of acquiescence under the operation of this warrant has been considerable, we see no legal ground upon which those who have joined in this application can be held barred of their right to call for the opinion of the court upon the validity of the warrant: and we feel ourselves bound in the execution of our duty of administering justice to all, not only to the suitors of the court, but to the officers and members of the court, to declare our judgment upon the effect and validity of the warrant in question, when called upon so to do.

Now, we think the question before us turns upon the single point, whether the Serjeants at Law have by the constitution of the court, and consequently by law, held and enjoyed the sole and exclusive privilege, by virtue of

their office or degree of Serjeant, of practising, pleading, and audience in the court of Common Pleas: for, if they are so entitled, we think they cannot be deprived of it by a warrant from the Crown under the sign-manual, nor indeed by any power short of an act of the whole legislature.

That the antiquity of the state, degree, and office of a Serjeant at Law is as high at the least as the existence of the court itself, is evident from all the text-writers and records which bear upon the point. The Serjeants are mentioned in *The Mirror of Justices*, a book of great authority, and of the earliest, though uncertain, date; by Bracton, who wrote in the time of Henry the Third; and in the records which are to be found in the Tower, of the time of Edward the First. They are called to the state and degree of Serjeants *by writ*, which of itself is a strong argument of the antiquity of their office, the form of such writ being found in the most antient Manuscript Registers, in substance the same with the writ by which they are called to that degree at the present day. By their oath of office, which has existed from the earliest time—an oath by which no other barrister is bound to give attendance in any particular court—they bind themselves “to give due attendance for the service of the King’s people in their causes.” As early as any authentic records exist, the Serjeants are found to be practising in the court of Common Pleas; and there is no evidence of any other barrister being allowed to practise or practising in that court—see the various authorities collected in the speech of the Lord Commissioner Whitlocke to the newly-created Serjeants, in his Memorials, p. 356.

We therefore think ourselves justified in saying, that, from time immemorial, the Serjeants have enjoyed the exclusive privilege of practising, pleading, and audience in the court of Common Pleas. Immemorial enjoyment is the most solid of all titles: and we think the warrant of the Crown can no more deprive the Serjeant who holds

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an immemorial office, of the benefits and privileges which belong to it, than it could alter the administration of the law within the court itself. The rights and privileges of the Serjeant and the rights and privileges of the Peer of the realm stand upon the same foundation—immemorial usage.

We hold, therefore, that the right of the Serjeants to the sole and exclusive privilege which they claim is still in existence, notwithstanding the King's warrant, and we feel ourselves bound in the due course of administering justice, to allow such right to be still exercised.

Extreme cases may certainly occur in the progress of time, under which the court might be called upon, for a time at least, to admit others to plead and practise within it, until the circumstances which created such necessity had passed over; and this in order to prevent a failure in the administration of justice to the Queen's subjects, for which end all courts of justice were instituted. Littleton, J., in the case of *Paston v. Genney*, Serjeant at law, Trin. 11 Ed. 4, fo. 2, pl. 4, says: "If all the Serjeants were dead, we could hear the apprentices to plead here, by necessity, and in ease of the people:" to which Bryan, C. J., answers: "Then, according to you, no Serjeant shall be made for necessity, &c." And it appears to us upon the present occasion, that, as the Serjeants have, by their own voluntary acquiescence under the supposed legality of a warrant which they now dispute, induced the suitors of the court to retain as counsel in their causes in this court during Term time barristers who are not of the degree of the coif, it would be against reason and justice that such suitors should not have the full benefit of the services so engaged by them.

Whilst, therefore, we declare our opinion to be, that, under the present constitution of the court, we ought to allow the Serjeants the exclusive liberty of practising, pleading, and being heard in this court during Term

time, it is with this reserve, that all barristers not being of the degree of the coif shall be heard in the business of the suitors in which they are at present *engaged* (120), until the same be fully dispatched and brought to an end.

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At the rising of the court, *Newton* applied for leave to enter upon the files of the court his *protest* against the above decision. Newton's Protest.

The application was negatived by the court, as being quite unprecedented.

Thursday,
Jan. 23rd.

Sir F. Pollock, after expressing his satisfaction at the course adopted by the court, requested to be informed whether or not it was intended to permit gentlemen not of the degree of the coif to move in this court for new trials in those cases in which they were engaged at Nisi Prius or at the Assizes. New trials.

TINDAL, C. J.—No: we will recur to the antient practice.

Sir F. Pollock appeared in support of an interpleader rule. In answer to a question from the court, he stated that *his instructions were delivered* to him before Monday, the 20th; whereupon— Counsel already engaged.

TINDAL, C. J., observed: "Then you are entitled to be heard; that is the dividing line."

Wednesday,
Jan. 29th.

Addison inquired whether pleadings in this court might in future be *signed* by members of the outer bar: he sug- Signing pleas.

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gested, that, if they could not, there was no one by whom they could be signed, it not being the practice for Queen's Serjeants or Serjeants having patent rank (which would include the whole of the Serjeants) to sign pleadings.

TINDAL, C. J.—I do not see why her Majesty's Serjeants should not sign pleas. The practice of the court is restored to its original state.

BOSANQUET, J.—I can remember King's Serjeants signing pleas, and even justifying bail.

Friday,
 Jan. 31st.
 Special case.

Newton again moved that the opinion of the court might be *recorded*, or that a special case might be granted, or the matter in some other way put in a course to receive the decision of a higher tribunal!

TINDAL, C. J.—It cannot be: we will not permit that which is a mere matter of regulation here to be made the subject of an appeal.

Wednesday,
 April 15th.

To entitle them to be heard in old causes, members of the outer bar must have been actually *engaged*, not merely *retained*, prior to the 20th January, 1840.

On the 15th April, in answer to the claim of a gentleman to be heard by virtue of a *retainer* given to him previously to the 20th of January—

TINDAL, C. J., read that part of the concluding paragraph the of judgment of the 21st January, which provides "that all barristers not being of the degree of the coif shall be heard in the business of the suitors in which they are at present *engaged*, until the same be fully dispatched and brought to an end." and observed that the word "*engaged*"

had been purposely introduced into the judgment of the court, in contradistinction to a mere "retainer."

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Friday,
Nov. 6th.

On the 6th November following, *Kelly* claimed the right to make an original motion in a cause, by virtue of an ancient retainer. An objection being made by one of the Serjeants—

TINDAL, C. J., said:—The rule laid down by the court on the 15th April last, was, that, to entitle a gentleman not of the degree of the coif to address the court in an old cause, it must appear that he was actually *employed*, that he had *received his instructions* in the cause, prior to the 20th January. To the rule so laid down we adhere.

PAINTER v. THOMAS LINSELL and WILLIAM LINSELL.

WHITE, in Michaelmas Term last, obtained a rule calling upon the defendant Thomas Linsell to shew cause why an order of Mr. Justice Erskine, directing Mr. John Duncan, an attorney of this court, to deliver to Mr. Wilkinson, the defendants' present attorney, his bill of costs in this cause and all other causes and matters wherein he had been concerned for the defendants, should not be discharged.

The motion was founded upon an affidavit of Mr. Duncan, stating, amongst other things, that, in September last, he, at the request of Painter, and *on his retainer*, prepared the draft of a deed to secure an annuity of 38*l.* per annum to Painter from Thomas and William Linsell, and that the said draft was perused by Mr. Wilkinson for and on be-

Saturday,
Jan. 11th.

A charge for preparing a warrant of attorney renders an attorney's bill taxable.

Upon the negotiation of a loan by way of annuity from the plaintiff to the defendant, one D., the plaintiff's attorney, prepared the agreement and securities *on behalf of both parties*, the agreement providing that the expenses should be paid by the defend-

ant; but, one of the securities being a warrant of attorney, another attorney attended on the defendant's part to see it executed and to attest it:—Held, that the defendant was entitled to call upon D. to deliver his bill, with a view to its taxation.

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half of Thomas and William Linsell, and returned approved; that Wilkinson acted throughout the settlement of the business as the attorney of and for the said Thomas and William Linsell, by perusing, altering, and approving, not only such draft, but also the *warrant of attorney* which was executed together with it, on their behalf; that Wilkinson witnessed the execution of the said deed as the attorney of the said Thomas and William Linsell, and saw the consideration-money paid to Thomas Linsell, and that he also witnessed the execution of the warrant of attorney, and subscribed his name to the attestation clause thereof, in the usual form; that Painter, who was deponent's client, had paid the bill; that he (deponent) had no claim whatsoever on or against Thomas Linsell; that he never was concerned for Thomas Linsell as his attorney in any matter, cause, or thing whatsoever, save and except in so far as the preparing of the agreement between him and Painter, relating to the sale and purchase of the said annuity, which deponent prepared as the attorney of and for Painter as aforesaid, he may be considered to have acted as attorney also for Thomas Linsell; that the agreement prepared by the deponent was made between Painter of the one part, and Thomas Linsell of the other part, and was the contract for the sale and purchase of the said annuity, and, amongst other clauses, contained the following: "and further, that the expenses of preparing and perfecting such securities, and of these presents, and every thing relating in any manner to the said transaction, shall be paid by the said Thomas Linsell;" and that to deponent's knowledge or belief there was no other cause in which Painter was plaintiff and Thomas Linsell defendant, than that mentioned in the said warrant of attorney.

Thomas Linsell's affidavit.

Chandless now shewed cause, upon affidavits stating, that Duncan was employed to prepare an agreement between Thomas Linsell and Painter, and also a grant of annuity,

warrant of attorney, and securities, to be given in pursuance of such agreement, upon the terms that Thomas Linsell should pay Duncan his charges in respect of such agreement and such securities; that, in the preparing of such agreement, Duncan acted as well as the attorney of Thomas Linsell as of Painter, the agreement being prepared by Duncan, and Thomas Linsell employing no other attorney on his behalf; that, soon after the signing of the agreement, Duncan sent to Thomas Linsell the draft of the grant of annuity; that he, Thomas Linsell, had not, when the said draft grant of annuity was sent to him, employed Wilkinson in any manner in this transaction, nor did he intend to employ him in the business; but that, William Linsell being required to join in the said grant of annuity, *he* wished Wilkinson, who had acted in other transactions as *his* attorney, to peruse the draft on his behalf, and the deponent thereupon, at the request of William Linsell, took the draft to Wilkinson, and requested him to do so. Wilkinson's clerk also swore, that, on or about the 18th October last, Duncan called at Wilkinson's office, and inquired why his bill was not paid; that, being informed by deponent that Thomas Linsell thought it exorbitant, Duncan said "Why does he not make a tender? If it is not paid to-day, I will issue a writ against him."

He submitted that Thomas Linsell, being the party to be charged with the bill—*Webb v. Rhodes*, 8 New Cases, 732, 4 Scott, 497—was the party entitled under the statute 2 Geo. 2, c. 23, s. 23, to have the bill taxed.

White, in support of his rule.—Mr. Duncan was not attorney for Thomas Linsell, and had no claim upon him for his bill of costs. Linsell, therefore, had no right to have a signed bill delivered to him under the statute, nor to have the bill taxed—rights which, according to the authority of *Curling v. Sedger*, 4 New Cases, 743, 6 Scott, 678, 6 Dowl. 759, are correlative.

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BOSANQUET, J.—I am of opinion that this rule should be discharged. The question is, whether or not Thomas Linsell is liable, either separately or jointly with other parties, to Mr. Duncan for the costs and expenses of preparing certain securities: if he is so liable, he is entitled to have the bill taxed. The transaction appears to be this. Painter was about to advance to Thomas Linsell a certain sum in consideration of an annuity. Duncan, who was the attorney of Painter, was employed to draw up the agreement. The agreement, as between Painter, the lender, and Linsell, the borrower, provides for the payment of the expenses "of preparing and perfecting the securities, and of those presents, and every thing relating in any manner to the transaction," by the latter. The agreement does not shew in express terms by whom Duncan was employed. He, however, prepared the agreement, and knew that Thomas Linsell was at all events ultimately to pay his charges. I do not say that that circumstance is conclusive to shew that Thomas Linsell was Duncan's client. It does not appear that any other attorney was employed on Thomas Linsell's behalf: but, in carrying the agreement into execution, a surety was required; and, at the desire of the surety, the drafts of the securities (one of which was a warrant of attorney, the charge for which would render the whole bill taxable (121) provided Thomas

(121) In *Sandom v. Bourn*, 4 Camp. 68, it was held, for the first time (by Lord Ellenborough) that "the preparing of a warrant of attorney is *with a view to business to be done in court*, and the expense comes under the head of 'fees at law;'" and therefore taxable. This was followed by *Weld v. Crawford*, 2 Starkie, 538, *Wilson v. Gutteridge*, 4 D. & R. 736, 3 B. & C. 157 (in neither of which had the instrument been executed), and *James*

v. Child, 2 Tyr. 732. The propriety of the original decision (*Sandom v. Bourn*) was doubted by Bayley, J., and Best, J., in *Burton v. Chatterton*, 3 B. & A. 486.

But there was nothing upon the face of the affidavits in the present case to shew that the warrant of attorney in question was a *warrant to confess judgment in this court*, without which, it seems, the court could have no jurisdiction in the matter: *Ex parte King*, 3 N. & M. 437.

Linsell is entitled to call for it) were laid before Wilkinson, his attorney. Admitting that it is doubtful upon the face of the agreement by whom Duncan was employed, we may look to his subsequent conduct, to see what his impression was upon the subject. It appears to me that his conduct is conclusive: for, when applied to by Wilkinson on the part of Thomas Linsell for his bill of costs, he says: "I shall give him no bill of costs: he has had one already:" and on a subsequent occasion, when told by a clerk at Wilkinson's office, that Linsell thought his demand exorbitant, he asked—"Why does he not make a tender?" and added—"If it is not paid to-day, I shall issue a writ against him." This clearly shews that Duncan thought Thomas Linsell liable to him for the costs; and if so he was entitled to have a bill delivered to him.

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ERSKINE, J.—The whole question is one of fact—whether or not Duncan was employed by Thomas Linsell as his attorney in this transaction. Linsell swears that he was: Duncan does not positively aver that he was not; but he says that "he never was concerned for Thomas Linsell as his attorney in any matter, cause, or thing whatsoever, save and except in so far as the preparing the agreement between him and Painter relating to the sale and purchase of the said annuity, which he prepared as the attorney of and for Painter, he may be considered to have acted as attorney also for Thomas Linsell." The two statements are not necessarily contradictory. It does not appear that any attorney other than Duncan was employed when the agreement, which formed the basis of the transaction, was first entered into. At a subsequent stage, Wilkinson was employed: but, assuming that Wilkinson acted for Thomas Linsell, it does not follow, because he was his attorney for one purpose, that Duncan was not his attorney for another. Besides, the presence of a second attorney was essential to the due execution of

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the warrant of attorney. Then, what was Duncan's conduct. He does not appear to have ever called upon Painter to pay the costs: but he threatens to issue a writ (which he must have intended on his own behalf) against Linsell unless he immediately paid the amount. I think this shews that he conceived, and rightly conceived, that Thomas Linsell was liable to him for the costs; and therefore that the rule must be discharged.

MAULE, J.—I am of the same opinion, on the ground that Thomas Linsell was the party to be charged, within the statute 2 Geo. 2, c. 23, s. 23, and therefore entitled to have a bill delivered to him, and to have it taxed; for, the power to call for the bill and to cause it to be taxed are co-extensive and correlative (122). It appears from the affidavits that Duncan did the work in question as the attorney for and on behalf of the two parties, the lender and the borrower. In the absence, therefore, of any express retainer by one only, the work being done for the benefit of both, and both accepting that benefit, both would be liable. By the terms of the agreement, the whole expenses were to be paid by Linsell. I therefore

(122) Quære this. The doctrine of the present day seems to be, that the courts have *no inherent jurisdiction*, in virtue of their general authority over their own officers, *to refer bills to taxation, independently of the statute*—Dagley v. Kentish, 2 B. & Ad. 411, 1 Dowl. 331; Howard v. Groom, 4 Dowl. 21; Doe d. Palmer v. Roe, 4 Dowl. 95; Ex parte Bowles, 1 Scott, 583, 1 New Cases, 632; Weymouth v. Knight, 3 Scott, 764, 3 New Cases, 387, 5 Dowl. 495: unless an action is pending—Curling v. Sedger, 6 Scott, 678, 4 New Cases, 743, sem-

ble. In the last mentioned case, it was held that the rights of a party to have a signed bill delivered, and to have it referred for taxation, are correlative. But see Clarkson v. Parker, 4 M. & Welaby, 532, where the court of Exchequer subsequently held that the court *has* a general jurisdiction, independently of the statute, to order an attorney to *deliver a bill* of costs to his client, and account for monies received, although they have *no power to order it to be taxed*, except in the cases provided for by the act.

think Duncan was right in treating Linsell as a party liable to him; and, being so liable, Linsell was clearly entitled to have a bill delivered to him.

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Rule discharged, with costs (123).

(123) The Lord Chief Justice, commission, for high treason, did being engaged on the trials of Frost not appear in court until the 10th and others at Monmouth, by special day of the term.

DOE *d.* DURRANT *v.* ROE.

BLAIR moved for judgment against the casual ejector, upon an affidavit of due service upon all the tenants in possession, on the 31st October last, with the exception of one, as to whom the affidavit alleged a service upon a servant of the tenant, in a coach-house attached to the premises, and a subsequent acknowledgment (not stating *when* it was made) by the tenant that the declaration and notice came to his hands on the 31st October. The premises were situate at Norwich, and the notice was to appear in Michaelmas Term.

Monday,
Jan. 13th.

On a motion for judgment against the casual ejector, where the service is upon a servant, the affidavit must shew an acknowledgment by the tenant that the declaration and notice came to his hands before the term, but it need not shew *when* the acknowledgment was made.

The Master stated that the practice required that the *acknowledgment* should be shewn to have been made before the first day of the term of which the tenant was to appear. (124) But—

THE COURT were of opinion that the affidavit was sufficient.

Rule granted.

(124) This certainly was once Doe d. Tindale v. Roe, 2 Chit. 180; understood to be the practice: see Anonymous, 2 Chit. 187; Doe d.

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The defendant authorized his agents, B. & S., to whom he was indebted, to effect in their own names an insurance upon his life. B. & S. having, subsequently to the date of the authority, taken a third person into their firm, caused the policy to be made out in the names of the three:—Held, that this was not a proper execution of the authority; and that B., the survivor of the firm of B. & S., could not (in the absence of any ratification by him) recover from the defendant the premiums paid on this policy, as money paid to his use.

BARRON v. FITZGERALD.

ASSUMPSIT for money paid and money had and received. Plea, non assumpsit.

The cause was tried before Coltman, J., at the sittings at Westminster after the last term. The facts were as follow:—Messrs. Barron & Stewart carried on the business of navy agents. The defendant was a naval officer, and had an account with them. On the 26th April, 1832, the defendant, being then indebted to Barron & Stewart, addressed to them the following letter:—

“Gentlemen,—I have to request that you will pay the premium for an insurance on my life for 200*l.* for seven years, and continue the future payment for the same on my account. This insurance being chiefly to secure your

Wilson v. Roe, Ad. Eject. 209; Doe v. Roe, 1 D. & R. 563; Doe d. Macdougall v. Roe, 4 Moore, 20. But it is difficult to conceive why it should be so, seeing that the time of the service is the time when the tenant *receives the declaration*, not the time when *he makes the acknowledgment*.

And see Doe d. Figgins v. Roe, 2 Scott's New Rep.

There are many cases where the service under circumstances similar to those in the present case has been held to be sufficient, though it was not shewn *when* the acknowledgment was made, the declaration appearing to have found its way into the hands of the tenant or his attorney before the term—Doe d. Teverell v. Snee, 2 D. & R. 5; Tenny d. Cutts v. Mills, 1 Scott, 52.

An acknowledgment by the tenant of his having received the declaration and notice *on a Sunday*, though delivered to a servant on the premises on the preceding day, is insufficient—Goodtitle d. Mortimer v. Notitle, 2 D. & R. 232 (nom. Doe v. Roe, 5 B. & C. 764); Doe d. Warren v. Roe, 8 D. & R. 342; Doe v. Roe, 8 D. & R. 592.

In two cases—Doe v. Roe, 2 D. & R. 12, and Doe d. James v. Roe, 1 M. & Scott, 597—a mere acknowledgment *by the servant* with whom the declaration was left, that it had been delivered to the tenant, was held to be good service. But these, it is conceived cannot be authority: see Doe d. Halsey v. Roe, 1 Chit. R. 100; Doe d. Thomas v. Roe, 1 M. & Scott, 435; Doe d. Tucker v. Roe, 4 M. & Scott, 165.

debt, you can have the policy effected in your own names, it being understood, that, when I shall be clear with you, it is to be re-assigned to me; and, in the event of my death before you shall have been paid off, it is my wish that the surplus, after you are satisfied, be paid over to Edward Parrott, in whose debt I am the sum of 100*l*."

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Pursuant to this authority a policy was effected on the life of the defendant, on the 27th April, 1832, in the names of Barron & Stewart. The annual premiums were duly paid in that and the following year. In August, 1833, the defendant's debt to Barron & Stewart was satisfied, but the policy was not assigned. The defendant sailed for the West Indies in September, 1833; and in November following the additional premium for sea-risk was paid by Barron & Stewart: but the premium due on the 27th April, 1834, not being paid, the policy became forfeited. In the month of November following, without any authority from or communication with the defendant, another policy for a similar amount, but at a higher rate of premium than the old one, was effected in the names of Barron, Stewart, & Smith. The premiums upon this second policy, which bore date the 27th April, 1834, were regularly paid by the new firm down to the year 1838, when, the defendant (who it appeared then for the first time became acquainted with the fact of the policy having been renewed) repudiating the authority of Barron, Stewart & Smith to effect such policy on his behalf, and refusing reimburse them the payments made by them upon it, the present action was brought by Barron as the survivor of the firm of Barron & Stewart.

To shew that the payments in respect of which the action was brought had been duly made, it was proposed to put in the original policy. This was objected to on the part of the defendant, the subscribing witness not being

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called. For the plaintiff, it was contended that the payments being authorized by the letter of the 26th of April, 1832, it was not necessary to prove the policy.

The learned judge allowed the policy to be put in, and left it to the jury to say—first, whether or not the plaintiff and Stewart were authorized by the defendant to renew the policy; and, if so—secondly, whether they were authorized to do so in the names of Barron, Stewart, & Smith—thirdly, whether the two did in fact renew the policy—fourthly, whether the premiums were duly paid.

The jury returned a verdict for the plaintiff for the amount of premiums paid on the renewed policy, deducting the excess over the sums that would have been payable under the first policy had it been kept on foot: and leave was reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the renewed policy was effected without authority.

Kelly, accordingly, in Hilary Term last, obtained a rule nisi for a nonsuit or a new trial—submitting, that there was nothing to dispense with the ordinary proof of the policy, by calling the subscribing witness or properly accounting for his absence; that the renewed policy was wholly unauthorized and useless; and that, if authorized, Smith should have joined in bringing the action.

W. H. Watson now shewed cause.—The action is brought to recover sums paid in respect of the second policy. The first policy was wholly immaterial: to support the plaintiff's claim, it was not necessary to prove a valid policy; it was enough to shew that the payments had been made pursuant to the defendant's instructions. [*Bosanquet, J.*—It was important to shew that the policy in respect of which the payments were made was a policy effected in accordance with the instructions of the defendant: for that purpose the production of the original policy was essential.] The autho-

rity was, to effect a policy for the defendant's benefit: this was substantially and properly done by the renewed policy. The defendant could not be at all prejudiced by the circumstance of the second policy being effected in the name of the new firm instead of the old one. The name in which a policy is made out is perfectly immaterial. In the case of sea policies, the broker commonly makes them out in his own name. [*Maule, J.*—There was an interval during which the defendant was uninsured.] Undoubtedly there was: but the neglect of Barron & Stewart to keep the insurance on foot did not put an end to their duty. If the question be one of fact, the finding of the jury has concluded it: and substantial justice has been done.

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Bompas, Serjeant, Kelly, and Petersdorff, in support of the rule.—The plaintiff could not make out his case without proving the first policy; and this he could only do by calling the subscribing witness or properly accounting for his absence. Assuming, as the argument on the other side supposes, that the second policy was the only one that was ever effected, it was incumbent on the plaintiff to prove the authority under which he acted, and that that authority was properly pursued. The authority was, to procure a policy to be effected on the defendant's life, in the names of Barron & Stewart: to procure the policy to be effected in the names of Barron, Stewart, & Smith, clearly was not a valid exercise of that authority. In *Comyns's Digest, Attorney*, (C. 11), it is said that "an authority ought to be strictly pursued; and therefore, if there be an authority to A. and B. to do such an act, one of them alone cannot do it: though one die the survivor cannot do it: so, though one refuse. So, if a man gives an authority to A., B., and C., his executors, to sell after the death of D., and one dies before D., the others cannot sell." Again, (C. 13).—"If a man act different from his authority, it is

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void: as, if an authority be to make livery or do any other act upon condition, and he does it absolutely." In *Fenn v. Harrison*, 3 T. R. 762, Buller, J., says: "If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent constituted so for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority; for, that would be to say that one man may bind another against his consent." And in *Attwood v. Munnings*, 1 M. & R. 66, 7 B. & C. 278, Bayley J., says: "The general rule is, that powers of attorney are to be construed strictly; and in all cases they are to be examined carefully, in order to see whether the act done by the attorney is fairly within the scope of the authority given by the principal." The defendant may have had such a knowledge of Barron & Stewart as to induce him to place confidence in them. What right had they to introduce as a trustee a third party, a stranger to him? Besides, the addition of this third party might create a difficulty in the way of a re-assignment. Again, the policy, having been effected in the name of one who never had an interest in the life insured, was clearly void on that ground. [*Maule, J.*—The statute 14 Geo. 3, c. 48, s. 1, enacts "that no insurance shall be made on lives, or any other events, wherein the person for whose benefit the policy shall be made shall have no interest; and that every such assurance shall be void."] Independently of the statute, the policy was void: at the time it was effected, neither Barron & Stewart nor the new firm were creditors of the defendant; they therefore had no insurable interest in his life. In *Godsall v. Boldero*, 9 East, 72, it was held that a creditor may insure the life of his debtor to the extent of his debt; but such a contract is substantially a contract of indemnity against the loss of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to the in-

suring creditor, the latter cannot afterwards recover upon the policy; and this although the debtor died insolvent, and the executors were furnished with the means of payment by a third party.

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BOSANQUET, J.—This is an action brought by Barron, who has survived his partner Stewart, to recover the amount of premiums paid on a policy of insurance on the life of the defendant, effected, as the plaintiff alleges, by the defendant's authority. It appears, that, in April, 1832, Barron & Stewart, the then agents of the defendant, received instructions from him to insure his life in their own names (they being creditors), for 200*l.*, for seven years, and to keep up the policy on his account; that a policy was effected accordingly, but at the expiration of the second year was suffered to lapse; that Barron & Stewart in the meantime took into the firm one Smith; that, when, to cure their neglect, they effected a second policy for the remaining five years, they did it in the name of the new firm of Barron, Stewart, & Smith, the debt due to Barron & Stewart having been paid, and the new firm never having been creditors of the defendant; and that it is for the premiums paid in respect of this renewed policy that the present action is brought. In order to establish the plaintiff's case, he produced a paper purporting to be a policy of assurance on the life of the defendant for seven years; but the subscribing witness was not called, nor was his absence sufficiently excused. The reception of this document was objected to on the part of the defendant: but the learned judge allowed it to be read. On the part of the plaintiff, it is now contended that this policy was altogether immaterial to his case, and need not have been produced at all; the defendant's letter of instructions, and proof of payment of the annual premiums upon the renewed policy being sufficient to entitle him to recover. The first policy, however, was produced, and

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submitted to the jury. It was essential for the plaintiff to prove that the second policy was effected pursuant to the authority contained in the defendant's letter of the 26th April, 1832: and the plaintiff, at least, thought it material to shew that the second policy was a continuation of the first. It is impossible to say that the jury did not take it into their consideration when the question of authority was submitted to them. But this point not having been reserved, the consequence of the improper reception of the first policy would only be to entitle the defendant to a new trial. It becomes necessary, therefore, to consider the second point, which goes to a nonsuit.—The authority was, to insure in the names of Barron & Stewart. The renewed policy was effected in the names of Barron & Stewart and another person, a stranger to the defendant. Was that a proper execution of the authority? If not, the premiums in respect of which this action is brought were not paid on the defendant's account, and the plaintiff cannot recover. It appears to me that the renewed policy was not within the authority given by the defendant's letter. The defendant appears not to have had any communication with the plaintiff's house since the change in the firm: he therefore never in any manner adopted Smith as his agent. But it is said that it is wholly immaterial in whose name the policy was effected, provided it was substantially a compliance with the defendant's instructions. But, is it so clear that the defendant could not be prejudiced by the manner in which his authority was executed? I think he might be; for, assuming the policy to be valid, Barron, Stewart, & Smith would be the persons entitled, in the event of the defendant's decease, to obtain the money from the office: or, supposing Barron & Stewart had both died, the right would devolve on Smith. Smith also would be authorized to release the debt to the office. It therefore appears to me that there has not been a proper execution of the autho-

rity, and that the rule for entering a nonsuit must be made absolute.

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COLTMAN, J., had gone to Chambers before the close of the argument.

ERSKINE, J.—I am of the same opinion upon both points. Possibly the production of the first policy was unnecessary: but it does not follow that the jury would have been satisfied without it: and, as it was produced, and submitted to them, if its reception was not in accordance with the rules of evidence, the verdict cannot be permitted to stand. It is quite clear, that, in the absence of the attesting witness, there was no proof of the execution of the document, and therefore it ought not to have been received. This, however, would only entitle the defendant to have the rule made absolute for a new trial. But, upon the other ground stated by my Brother Bosanquet, he is clearly entitled to have a nonsuit entered. Had the defendant's letter authorized Barron & Stewart to effect a policy in the names of themselves and any other person, I am not prepared to say the party whose name was used in conjunction with theirs could properly have joined in bringing the action: *he* might not have been authorized to pay the premiums. But the question is, was the policy effected according to the terms of the authority given by the defendant? He directs his agents Barron & Stewart to effect a policy in their own names. They do it in the names of themselves and one Smith. This certainly was not a strict and literal compliance with the authority. It is said that the authority was substantially pursued, and that the defendant could not be prejudiced. But it appears to me that his interests might be materially affected. In the event of the demise of both Barron and Stewart, Smith would be in a situation to call upon the office for any money that might become due on the policy: and,

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suppose the executors of Barron or Stewart to have brought an action against the personal representative of Fitzgerald, for the premiums paid, the latter would have no right to set off the money received by Smith. The objection, therefore, is not one of mere form.

MAULE, J.—I am of the same opinion. I think the first policy had a strong bearing upon the plaintiff's case, and that it was improperly received in evidence without proof of its execution in the ordinary way. The duty imposed upon the plaintiff and his partner was, to effect a valid policy; and the plaintiff could not recover without proving the due performance of this duty. The premiums in question not having been paid under the authority of the defendant's letter of the 26th April, 1832, the plaintiff must be nonsuited. The authority was, to effect a policy in the names of Barron & Stewart: and this being an authority given to them for their own benefit, I do not think it should be construed very strictly, provided that would not alter the situation of the defendant. But I think the mode in which the policy was effected was likely to place the defendant in a materially worse position, and therefore that the authority was not well executed.

Rule absolute.

Wednesday,
Jan. 15th.

DOE d. SCOTT v. ROE.

Service of a declaration and notice in ejectment on a broker with whom the key of the premises had been left by the tenant, who had absconded, and affixing a copy on the door of the house;—Held, good service.

BINGHAM moved for judgment against the casual ejector, upon an affidavit that the tenant had absconded, and, it was believed, left England, and that the declaration and notice had been served upon a broker with whom the key of the house had been left by the tenant for the pur-

pose of letting it, and that a copy had been affixed upon the door of the premises. He cited *Doe d. Scott v. Roe*, 6 Scott, 732, and *Doe d. Dickens v. Roe*, 6 Scott, 755, 7 Dowl. 121, where service upon the sextoness and the clerk, who had possession of the keys, was held sufficient to found a like motion, in the case of a dissenting chapel or chapel of ease, the minister (in the latter case) who was said to be the tenant in possession, having absconded.

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THE COURT were inclined to grant a rule nisi only ; but, on its being intimated to them, that, in the cases cited, the rule was absolute in the first instance, Tindal, C. J., in *Doe d. Dickens v. Roe* observing, that, "there was no one, Dr. Everard (the party who had absconded) being out of the way, upon whom a rule nisi could with any effect be served"—

BOSANQUET, J., said that the rule might be absolute in the first instance, upon the authority of that case.

MAULE, J.—The broker, having possession of the key, is quasi tenant in possession.

Rule absolute.

BIRCHAM v. TUCKER.

*Tuesday,
Jan. 14th.*

BOMPAS, Serjeant, moved to set aside an execution for irregularity. It appeared that the defendant had been taken under an execution issued upon a judgment on a warrant of attorney given by him jointly with another person, to secure a portion of a larger sum, for which his co-debtor had already been taken in execution ; and that

It is no objection to a judgment on a warrant of attorney, that no appearance has been entered.

The defendant was taken in execution on a judgment entered

up on a warrant of attorney which had been given by him jointly with another who had previously been taken in execution on a judgment for a larger sum, including that secured by the warrant of attorney :—Held, regular.

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judgment had been signed upon the warrant of attorney without the entry of an appearance. He submitted that it was a clear irregularity to enter up judgment without an appearance; and that, the plaintiff having had satisfaction against one of the joint debtors, it was not competent to him to sue out a second execution against the other.

The Master reported that the objection as to the want of an appearance was taken in Michaelmas Term last, and over-ruled by the court—*Kemp v. Matthew*, ante, p. 399.

BOSANQUET, J.—The first ground of objection here taken is, that the defendant has been improperly taken in execution, because another person who was jointly liable with him upon the warrant of attorney on which the execution is founded, had already been taken in execution upon a judgment for a larger sum, including the amount for which this warrant of attorney was given. But I cannot see anything wrong in that. The debt has not been satisfied. In Archbold's Practice, 7th Edit., 455, it is laid down, on the authority of the case of *Foster v. Jackson*, Hobart, 59, that "a ca. sa. is no satisfaction, so as to bar the plaintiff from taking out execution against other persons liable to the same debt and damages." That is the case here.—The objection arising from the want of an appearance is disposed of by the case to which we have been referred.

COLTMAN, J.—I am of the same opinion. The court do not give relief in this summary way, unless in cases where an audita querela would lie. This clearly is not a case of that sort. Unless one party had paid the debt, the other would not be released.

ERSKINE, J.—No objection could have been made if both had been taken on the warrant of attorney. What difference, then, can it make that the one was taken in

execution for another debt in addition to that secured by the warrant of attorney.

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MAULE, J., concurring—

Rule refused.

DOE d. MUSSELWHITE v. ROE.

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ADDISON moved, in a country ejectment, for judgment against the casual ejector. A term had been permitted to elapse between the service of the declaration and the motion. He prayed for a rule absolute in the first instance, such being the course in the King's Bench—*Doe v. Roe*, 2 Dowl. 196; *Doe d. Thomson v. Roe*, 3 Dowl. 575. But—

Where a term has been allowed to elapse between the service of the declaration in ejectment and the motion for judgment, the rule for judgment, in *this court*, is nisi only.

The Master reporting the practice in this court to be to grant a rule nisi only—*Doe d. Beavan v. Roe*, 5 Scott, 618; *Doe d. Barth v. Roe*, 6 Scott, 433—

THE COURT granted a rule nisi, which was afterwards made absolute.

INGRAM v. LAWSON.

Wednesday,
Jan. 15th.

CASE for a libel. The declaration stated, that, before and at the time of the committing the grievances therein-after mentioned, the plaintiff was a master mariner and

To publish of a master-mariner and ship-owner that his vessel, (which is advertised for the

conveyance of goods on freight and passengers to Calcutta,) is unseaworthy and has been sold for a convict ship, is a personal libel on him in the way of his business, for which he may maintain an action without alleging special damage or proving malice.

In an action for a libel imputing to a vessel advertizing for passengers and freights for the East Indies, and to her master and owner (the plaintiff), that she is unseaworthy and in other respects unfit for the purpose:—Held, that evidence of the ordinary profits of such a voyage was receivable, and that the jury were properly told that they might take such evidence into their consideration in estimating the probable amount of damage sustained by the plaintiff from the publication of the libel—although the action was brought before the commencement of the intended voyage.

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ship-owner, and then and thenceforth hitherto carried on and exercised the business and occupation of a master mariner and ship-owner, and then and thenceforth hitherto was the owner of a certain ship called the Larkins, and the master and commander thereof, and then had made divers voyages in and with the said ship, and as her master and commander, and in the way of his said business and occupation, and with goods and passengers, to wit, from London to Calcutta in the East Indies, and from Calcutta aforesaid to London, and to and from divers other places; that, before and at the time of the committing of the said grievances, the plaintiff, so being such master mariner and ship-owner, and master and commander and owner of the said ship as aforesaid, and the said ship being in the East India Docks in London, intended and was about to sail within a short space of time, to wit, within three months, in and with the said ship from London to Madras and Calcutta, and had advertized for freight and passengers on the 31st October, 1837, &c., &c.; that the plaintiff had always conducted himself, as well in the way of his said business and occupation as otherwise, with skill, care, judgment, and integrity, and had never been guilty, nor, until the committing of the said grievances, been suspected to have been guilty of endeavouring to procure goods on freight or passengers for an unseaworthy ship, nor of sending or intending to send to sea with goods and passengers a ship unfit for such purposes, or of any other the misconduct thereafter mentioned to have been imputed to him; that the said ship, before and at the time of the committing of the said grievances, was a good seaworthy ship, fit and proper for the reception and conveyance on the said intended voyage of goods on freight and of passengers of respectability, and was not, nor until the committing of the said grievances was it suspected or believed that the said ship was sold to Jews to take out convicts, or unseaworthy, or unfit in any respect for the reception and con-

veyance on the said intended voyage of goods on freight and passengers of respectability: yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in his credit and reputation, and in his said occupation and business, and to cause it to be suspected and believed that the said ship was unseaworthy and unfit for the reception and conveyance on the said intended voyage of goods on freight, or passengers of respectability, and that the plaintiff, so being such ship-owner and master mariner as aforesaid, was guilty of endeavouring to procure goods on freight and passengers of respectability for a ship unfit for such purposes, and of other the misconduct thereafter mentioned to have been imputed to him, and to vex, harass, oppress, impoverish, and ruin the plaintiff, before the commencement of the suit, to wit, on &c., wrongfully, maliciously, and injuriously published of and concerning the plaintiff, and of and concerning him in the way of his said business and occupation, and of and concerning the said ship and the said intended voyage, the following libel:—"To the Editor of the Times. Sir,—I think no apology necessary for troubling you with the following statement. I have but one motive in giving publicity to the communication. I overheard a servant on our establishment remark to one of his fellow servants, that his old ship had returned to England at last; but that the captain had been forced to put in at the Cape, and procure twenty additional hands to pump the ship to enable her to complete her passage; but he understood the Jews had bought her to take out convicts. With the recollection of the dreadful loss of life which in several instances has occurred from ships not seaworthy being employed for such purposes, I was induced to question the man; and learn that the ship's name is the Larkins. I think the captain's name is Ingram, late in the East India Service. He tells me, the voyage before last, when he was on board, they were obliged

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to pump every two hours all the way from Calcutta; and, on this last voyage, she was constrained to obtain the additional hands I have stated, to keep the ship afloat: but she is now purchased by some Jews for the purpose I have stated. I feel it my duty to give this publicity to it. I give you the statement as I heard it. I know nothing of the parties; and, as I have before remarked, I have but one motive, viz. the possible prevention of the recurrence of some fearful calamity. W. T." By means whereof the plaintiff had been and was greatly prejudiced and injured in his credit and reputation as such ship-owner and master mariner as aforesaid, and brought into public scandal and disgrace; and it had been suspected and believed that his said ship, for which he was so desirous as aforesaid to obtain goods on freight and passengers of respectability on the said intended voyage, was unfit for that purpose, and that he had conducted himself dishonestly and improperly in relation to the said intended voyage; and had been greatly vexed, harassed, oppressed, and impoverished, and greatly hindered and prevented in and from obtaining goods on freight and passengers of respectability on the intended voyage for his said ship, and had also lost and been deprived of divers great gains and profits which might and otherwise would have arisen and accrued to him in his said business and occupation, and had been and was otherwise much injured and damnified.

The defendant pleaded the general issue (125).

The cause was tried before Maule, J., at the sittings in London after the last term. The action was commenced three days after the publication of the libel. Evidence was offered on the part of the plaintiff, to shew what was

(125) A special plea of justification of the charge of unseaworthiness was held bad on special demurrer, on the ground that it left

unanswered a material part of the charge contained in the libel: see 5 New Cases, 66, 6 Scott, 775.

the average profit that the captain of a vessel of the description of the *Larkins* might expect to make on a voyage to Madras and Calcutta; and that, upon the voyage made immediately (about four months) after the publication of the libel in question, the captain's profits fell short of the average by about 1500*l*. This evidence, though objected to on the part of the defendant, on the ground that there was no special damage laid in the declaration, and that this was a damage accruing subsequently to the commencement of the action, was admitted by the learned judge: and, in leaving the case to the jury, he told them that the only question for them was, what damages the plaintiff was fairly entitled to for the publication of the libel; and that, in estimating the damages, they might take into their consideration the profits usually accruing to the captain from such a voyage as that contemplated.

The jury returned a verdict for the plaintiff, damages 900*l*.

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Humfrey now moved for a new trial on the ground of misdirection, and also to arrest the judgment.—The jury were clearly not entitled, the declaration merely averring general damages, to take into their consideration the prospective injury. In *Hodsall v. Stallebrass*, 3 P. & D. 200, where, in an action for a permanent injury to the hand of an apprentice from the bite of a dog, whereby loss of service accrued, the master was held entitled to recover for prospective damage, the declaration contained a special averment, that, by means of the premises, the fingers, hand, and arm of the apprentice had become and were *permanently* crippled and rendered unfit for use, and that he would never again be capable of working at his trade as he otherwise might and would have done, and that the plaintiff would thereby lose all benefit which he otherwise would have received from the *future* service and assistance of the apprentice. There is no such averment here. [*Maule*, J.—

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The damages are given for the publication of the libel.] In *Malachy v. Soper*, 3 New Cases, 371, 3 Scott, 723, Littledale, J., held at Nisi Prius that the jury could not take into account prospective damages. (126) Then, this is not an action for a libel containing any imputation on the character of the plaintiff: but for slander of title, and therefore the plaintiff could not maintain the action without averring and proving *malice*, either express or implied—*Hargrave v. Le Breton*, 4 Burr. 2422; *Smith v. Spooner*, 3 Taunt. 246; *Pitt v. Donovan*, 1 M. & Sel. 639; *Malachy v. Soper*, 3 New Cases, 371, 3 Scott, 723. (127)

BOSANQUET, J.—I am of opinion that no rule ought to be granted in this case. The substantial question is, whether the publication complained of is a libel on the plaintiff in the way of his business of a master mariner and ship-owner, or only in the nature of a slander of his title to the ship; for, if the latter, then, inasmuch as no special damage is alleged, the plaintiff would not be entitled to recover, and the judgment must be arrested; but, if it be a libel on the plaintiff in his business, it is actionable *per se* without any allegation of special damage. The declaration commences with an allegation that the plaintiff was a master mariner and ship-owner, and was the owner of a ship called the *Larkins*, and the master and commander thereof, and had made divers voyages in and with the said ship, and as her master and commander, and in the way of his said business and occupation, and with goods and passengers, to wit, from London to Calcutta, and from Calcutta to

(126) In *Hodsall v. Stallebrass*, 3 P. & D. 202, Littledale, J., said:—"In *Malachy v. Soper*, I held that the plaintiff's claim should be confined to damage already sustained, because the jury would be unable to estimate the future da-

mage to shares, which are liable to so much fluctuation that the account of damage could not be brought to any certain test."

(127) See *Robertson v. Macdougall*, 1 M. & P. 692, 4 Bing. 670.

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London, and to and from divers other places : it then goes on to state, that, the plaintiff so being such master mariner and ship-owner, and master and commander and owner of the said ship, and the ship being about to sail in a short time for Madras and Calcutta, the plaintiff advertized for freight and passengers ; and that the ship was sea-worthy, and fit and proper for the reception and conveyance on the intended voyage of goods on freight and passengers of respectability ; and then avers that the defendant, intending to injure the plaintiff in his credit and reputation, and in his said occupation and business, published the libel ; and concludes with a general allegation of damage and injury in his credit and reputation and as such ship-owner and master mariner, and consequent loss of profits which but for the publication of the libel would have accrued to him in his said business and occupation. It appears to me, the inducement being admitted, that this is a libel published of and concerning the plaintiff as a master mariner and ship-owner, and of and concerning the vessel of which he was master and owner, and an injury to him in his business for which he may recover damages without any allegation or proof of malice express or implied. With respect to the damages—It is said that the damage sustained at the time of commencing the action, is all that the plaintiff could recover, and that the jury were erroneously directed that they might take into account the prospective injury. But it appears to me that the jury were warranted in proportioning the damages to the amount of injury that would naturally result from the act of the defendant, though it might not affect him until a subsequent period. No one can doubt but that the libel was calculated most seriously to injure the plaintiff in the way of his business.

COLTMAN, J.—If this action was not maintainable without an allegation of special damage or proof of malice, then this verdict could not be sustained. But I am of opinion

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that nothing of the sort was necessary. This is not a case of slander of title; but a libel of and concerning the plaintiff in the way of his business of a master mariner and ship-owner, and with reference to an intended voyage. To say of a captain of a ship on the point of sailing that which is stated in this letter, is clearly an imputation on his personal character, and actionable without malice. It is like saying of an innkeeper or a tea-dealer, that his wine or his tea is poisoned. There is no pretence for saying that the omission to leave it to the jury to say whether there was malice or not, was a misdirection. With respect to the damages—the jury must adopt some mode of estimating the damage likely to result to the plaintiff from the publication of the libel: and, how could they do this without evidence of the kind admitted here? I think there is no ground either for a new trial or for arresting the judgment.

ERSKINE, J.—I am of the same opinion. Two objections are taken to the manner in which this case was left to the jury—first, that they were not told that malice was essential to the maintenance of the action—secondly, that they ought not to have been told, that, in estimating the amount of damages, they might take into consideration the loss of profits on the voyage taken after the commencement of the action. It is unnecessary to consider the first point (though I would not have it supposed that the judge is bound in his summing up to make every point that by possibility could be made, when his attention has not been called to it by the counsel in his address); for, this is not the case of a mere slander of title. The declaration states that the plaintiff was not only captain but also owner of the *Larkins*, and that the libel was published of and concerning him in his business of a master mariner and ship-owner: and the libel states that the vessel was on a former voyage in such a leaky state as to be kept afloat with difficulty, and that she had been sold to some Jews for the purpose of taking

out convicts. It is true the libel does not state that the plaintiff was the owner of the ship: but her name and that of the captain are given, and that sufficiently identifies her with the vessel mentioned in the inducement. Is it no personal libel upon a man who is owner of a ship in the condition in which this vessel is described to be, that he has continued it in the trade, and afterwards sold it for the purpose of being employed as a convict ship? I can hardly conceive a more flagrant libel than the imputation of such conduct as this. As to the damages, I think that general evidence of the profits of a voyage such as that for which the *Larkins* was advertized was properly received; and that the jury were warranted in taking the profits of former voyages into their consideration, in order to enable them to arrive at an estimate of the probable injury the plaintiff had suffered.

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MAULE, J.—I am also of opinion that there is no ground for this motion. The publication in question was clearly a libel on the plaintiff in the way of his business of a master mariner and ship-owner: indeed, it was so assumed on all hands at the trial. It cannot therefore be contended that malice need be alleged or proved. Then, as to the evidence of profits—Unless the jury knew what were the usual and ordinary profits of a voyage, how could they estimate the damages that were likely to result to him from the diffusion of the libel? The motion in arrest of judgment rests substantially on the same ground as that for a new trial. I think there is no pretence for either.

Rule refused.

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By a charterparty the defendant engaged to provide a cargo for the vessel at Marseilles for London, and to pay freight and charges on delivery there, one half in cash, and the remainder by an approved bill at three months' date. In an action on this charterparty, the plaintiff assigned for breach that the defendant did not provide a cargo, whereby the plaintiff lost profits, and was put to charges in procuring other freight for the homeward voyage; and that the defendant had not paid the money or given the bill in the charterparty mentioned. The jury having given general damages:—Held, on motion in arrest of judgment, that this was in substance but one breach.

Breach.

HOGGETT v. EXLEY.

ASSUMPSIT on a charterparty. The declaration stated, that, by a certain charterparty of affreightment made by and between the plaintiff, owner of the ship *Spring*, and the defendant, on the 17th December, 1838, it was agreed that the said ship should with all convenient speed proceed to Marseilles, and there take on board from the agents of the said freighter a full and complete cargo of wheat, and should therewith proceed to London, or so near thereunto as she might safely get, and there deliver the same to the freighter, or his assigns, they paying freight for the same 7*s.* per quarter of wheat, and 10*s.* per cent. thereon in lieu of all pilotage and port charges during the said voyage, the act of God, &c., excepted: the freight to be paid—one half in cash, and the remainder by an approved bill on London at three months' date: And the plaintiffs averred, that, in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform the said charterparty in all things on his behalf as such owner to be performed, the defendant then promised the plaintiff to perform the said charterparty in all things on his behalf to be performed, and to provide and take to and alongside of the said ship the said cargo to be taken on board of the said ship according to the true intent and meaning of the said charterparty; that the said ship with all convenient speed did arrive at Marseilles, and thereupon the said master was then ready and willing to take on board the full and complete cargo of wheat aforesaid, according to the terms of the said charterparty, and did then give immediate notice thereof to the defendant's agent: Yet the defendant, not regarding his said promise, did not, nor did any other person or persons on his behalf, provide and take to or alongside of the said ship such cargo of

wheat as aforesaid, or any part thereof, according to the terms of the said charterparty; but, on the contrary thereof, wholly neglected and refused so to do, or to furnish any cargo whatever for the said ship on the said voyage: By means of which said several premises the plaintiff lost and was deprived of all the profit and advantage which he might and otherwise would have made under and by virtue of the said charterparty, amounting to a large sum of money, to wit, the sum of 1,000*l.*; and the plaintiff was also by reason of the premises aforesaid put to great charges and expenses in and about endeavouring to procure and procuring another freight for his said ship for her homeward voyage, amounting to a further large sum, to wit, the sum of 500*l.*: of all which said several premises the defendant then had notice; but the defendant had not paid to the plaintiff the said sums of money, or any part thereof, or given the said bill in the said charterparty mentioned, but wholly neglected and refused so to do, contrary to his said promise; to the plaintiff's damage of 3,000*l.*

A verdict having been found for the plaintiff on the entire declaration, damages 225*l.*—

Bompas, Serjeant, moved in arrest of judgment.—By the terms of the charterparty the defendant undertakes to provide a cargo for the vessel, and to pay freight and charges, one half in cash and the remainder by bill on London. The breaches assigned, are, that the defendant did not provide a cargo, and that he did not pay the money or give the bill in the charterparty mentioned. Now, inasmuch as no freight ever became due, and consequently the defendant never became liable to pay the money or to give the bill, the second breach is ill assigned; and, as it is impossible to divine in respect of which breach the damages were given, the judgment must be ar-

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rested. [*Maule, J.*—The breach is, that the defendant neglected to furnish a cargo: the statement at the end of the declaration, that the defendant had not paid the money or given the bill, is not an assignment of a second breach.] In *Sicklemore v. Thistleton*, 6 M. & Sel. 9, where the plaintiff declared upon a lease made by him to J. T. for years of a messuage and farm, at a yearly rent, payable quarterly, J. T. covenanting to pay the rent at the days and in manner therein mentioned, and also to pay interest in case the rent should be behind three quarters; and the defendant covenanted that J. T. should at all times during the term well and truly pay to the plaintiff the said rent at the respective days, and also interest, and should duly observe all the covenants, and that, in case J. T. should neglect to pay the rent for forty days, defendant should pay on demand: it was held that the defendant was not chargeable until after forty days, and demand made; and, the plaintiff having declared generally, assigning for breach rent in arrear, and it appearing upon oyer that the lease contained the qualification above stated, that the breach was ill assigned: and, the jury having given general damages upon the whole declaration, which contained other breaches that were well assigned, judgment was arrested.

BOSANQUET, J.—There is no ground for arresting the judgment in this case. The declaration contains, in substance, but one breach of contract, viz. the neglect to provide a cargo.

ERSKINE, J.—I am of the same opinion. In *Sicklemore v. Thistleton*, there were several covenants, and distinct breaches assigned on each. Here, however, there is substantially but one breach, which is not vitiated by the introduction of unnecessary matter.

MAULE, J.—There is in fact but one breach—like an allegation that one did not employ a clerk or servant, or pay him wages.

Rule refused.

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CASE.—The declaration stated, that, before and at the times of the committing of the grievances by the defendant, the plaintiff was desirous of printing and publishing for sale a certain work, to be continued annually, under the name and title of "The Catholic Directory and Annual Register," whereof the defendant then had notice; that, on the 1st October, 1837, the plaintiff retained and employed the defendant, at his request, to print the aforesaid work for the plaintiff, for reasonable reward to be paid by the plaintiff to the defendant in that behalf; that the plaintiff then delivered to the defendant, at his request, divers large quantities, to wit, sixty reams, of paper, to be by the defendant used in and about the printing of the said work, and on which the same was to be printed; that the defendant then accepted and entered upon such retainer and employment, and took and received the said paper from the plaintiff for the purpose and upon the terms aforesaid; and thereupon it then became and was the duty of the defendant to use due diligence in and about the printing of the said work, and to proceed with the same with reasonable despatch, and also to print the said work upon the said paper so delivered to him by the plaintiff for that purpose: nevertheless, the defendant, not regarding such his duty or his said retainer and employ-

The plaintiff declared in case that he retained the defendant to print for him a certain work, and delivered to him certain paper to be used in the printing thereof; that the defendant accepted the retainer, and received the paper for the purpose aforesaid; and that thereupon it became and was the duty of the defendant to use due diligence in the printing of the work, and to print it upon the paper so delivered to him: nevertheless, the defendant, not regarding his duty or his said retainer, did not proceed with reasonable despatch, and did not use the paper sent to him in and about the printing of the work, but

wholly neglected and refused so to do, and, on the contrary thereof, wrongfully and without the license of the plaintiff, used the paper for other purposes, and wrongfully and in violation of his duty, pledged the paper with divers persons to the plaintiff unknown, to raise money for his own purposes:—Held, that case was the proper form of action for the wrong complained of.

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ment, but contriving and intending to injure and aggrieve the plaintiff in that behalf, did not nor would use due or any diligence in and about the printing of the said work, and did not nor would proceed with the same with reasonable despatch, but, on the contrary thereof, greatly neglected the business of his said retainer and employment, and for a long period, to wit, for six months then next following, proceeded with the printing of the said work in a dilatory and negligent manner: and the defendant also, further wrongfully and injuriously contriving to prejudice and aggrieve the plaintiff in that behalf, further disregarded his said duty and retainer, and deceived the plaintiff in this, that the defendant did not nor would use the said paper so furnished to him by the plaintiff in and about the printing of the said work, and did not nor would print the said work thereupon, *but* wholly neglected and refused so to do, *and*, on the contrary thereof, wrongfully and injuriously, and without the license and against the will of the plaintiff, used divers large quantities, to wit, sixty reams, of the same paper for other and different purposes than for the printing of the said work, to wit, for the private purposes and for the use and benefit of the defendant only; and then wrongfully, and in violation of his duty in that behalf, pawned and pledged the said last-mentioned paper with divers persons to the plaintiff unknown, in order to raise money for the private purposes of the defendant: By means of which said several grievances the plaintiff had not only lost and been deprived of the said last-mentioned paper, but the publication of the said work was greatly delayed, and the same could not be and was not published until a very long and unreasonable time, to wit, six months, longer than that in which but for the committing of the said several grievances by the defendant the same might and otherwise would have been published; whereby the sale of the said work was greatly diminished and curtailed, and the plaintiff lost and was deprived of the

means of disposing of divers, to wit, two thousand copies thereof, to divers persons who otherwise would have been purchasers of the same; and the plaintiff had, by reason of the premises, lost and been deprived of divers large gains and profits, and had been and was otherwise injured and damnified.

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Special demurrer, assigning for causes—that this action on the case was brought for the non-performance of a duty supposed to have arisen out of a retainer and employment, whereas, the obligation, if any, to do the act for the non-performance of which the action was brought, could only have arisen from some promise of the defendant, and no promise was stated—that an action on the case does not lie for the non-performance of a promise, or for the non-performance of any duty but a public duty—that no such duty in the defendant was averred, nor was any such duty as that stated in the declaration to be inferred from the defendant's retainer and employment—that it was not averred that the defendant had been requested to publish the work in question—that the defendant was not bound to print it on the identical paper delivered to him; it was sufficient if he printed it on paper of as good a quality—and that the declaration, as far as it referred to the user of the paper by the defendant, was only an informal and argumentative statement of a conversion, and of a cause of action in trover. Joinder.

Special demur-
rer.

Channell, Serjeant, in support of the demurrer.—The declaration alleges a contract, the ordinary remedy for a breach of which would be an action of assumpsit; and, unless there appears to have been on the part of the defendant a breach of some legal duty arising from the relative situation of the parties, or otherwise, case will not lie. The earlier breaches charged in the declaration are clearly acts of non-feazance only. It is true the defendant is also charged to have wrongfully misapplied and pledged the paper: but

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that is not stated as a distinct and substantive breach ; it is connected with the preceding allegation by the conjunctive "and:" the defendant could not plead to it as a separate breach: the whole amounts but to a charge of *non-feazance*. The question therefore is, whether, the defendant having received the paper to be used in the printing of a certain work, there was any common law obligation on him to use the identical paper for the purpose, or whether it was a duty resulting only from his contract. If the contract may be considered as mere inducement, then, perhaps, according to the authority of *Mast v. Goodson*, 3 Wils. 348, 2 W. Blac. 848, and *Samuel v. Judin*, 1 New Rep. 43, 6 East, 333, the declaration may be supported in its present form. In *Mast v. Goodson*, it was held that a count upon an agreement in writing, that the plaintiff should build a yard in the defendant's close, and lay out not less than 20l. thereupon, and that the plaintiff should enjoy it for his life, with an averment that the plaintiff did build the yard, &c., and enjoyed the same for some years as an easement, and assignment of breach that the defendant wrongfully and injuriously obstructed him in the enjoyment of his said easement, might well be joined with a count in trover: and the court, in giving judgment, say: "The gist of this action upon the first count is this, viz. that the defendant did by himself and servants *wrongfully and injuriously* obstruct and hinder the plaintiff from landing divers large quantities of his goods upon the yard, contrary to the written agreement before set forth in that count; it was necessary for the plaintiff to set forth the agreement to shew himself entitled to the easement of landing his goods upon the yard, which he had built, and laid out a sum of money thereupon, and had enjoyed the same for about ten years accordingly; and having done this very properly, the plaintiff goes on and alleges in this count, that the defendant, well knowing the premises, obstructed him in the enjoyment of his easement:

this is certainly a *misfeasance*, and sounds wholly in *tort*, *force*, and *wrong*, and not in *contract*; for, the *agreement* or *contract* which had been for some years before executed both by plaintiff and defendant, is only introductory to shew the *tort* or *wrong* done by the defendant to the plaintiff in hindering him from the enjoyment of his easement which he had an undoubted right to enjoy; so that we are of opinion the first count is founded upon a *tort*, and not upon *contract*." And in *Samuel v. Judin*, it was held that a count stating that the plaintiff had delivered a note to the defendant to get it discounted, and account with the plaintiff for the money raised on it, and that the defendant received the note for that purpose, but, intending to defraud the plaintiff, had not, though requested, accounted with him, &c., is laid in *tort* (whether formal or not in its frame), and not in *assumpsit*, and may be joined with a count in *trover*.

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S. Martin, contra.—The declaration is unexceptionable. The defendant's possession of the paper was rightful, and therefore the objection that the count is an informal count in *trover* fails—*The Six Carpenters' Case*, 8 Rep. 146. a. "When an entry, authority, or license, is given to any one by the law, and he abuses it, he shall be a trespasser ab initio: but not where the entry, authority, or license is given by the party." The mis-application or pledging by the defendant of the paper he had received from the plaintiff for the purpose of printing his work upon it, was clearly a *tort*; it was a dealing with the plaintiff's chattel in a manner contrary to the authority given to him: and case was the appropriate and the only remedy.

BOSANQUET, J.—This case comes before us on special demurrer: but the precise form in which the breach is alleged is not assigned for cause. The real question is, whether the acts imputed to the defendant amount to a *tort* or to a

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mere breach of contract. It appears that the paper was delivered to and received by the defendant for a specific purpose, under a contract. The plaintiff, therefore, had parted with the immediate possession of the paper; and the possession of the defendant was lawful at the time. Being thus lawfully possessed, the defendant, instead of applying the paper to the purpose for which it was delivered to him, wrongfully pledged it. That clearly was a tortious act. The substantial ground of complaint is, the misappropriation of the paper. I therefore think the demurrer cannot be sustained.

COLTMAN, J., was at Nisi Prius.

ERSKINE, J.—I am of the same opinion. Though many of the allegations in the breach are of mere omissions to perform the contract, there is a distinct and substantive allegation of an act which amounts to a tort. The paper was delivered to the defendant for a specific purpose: and he not only neglects to apply it to that purpose, but tortiously deals with it for his own profit. I therefore think the count is good.

MAULE, J.—I am of the same opinion. The question is whether that which is complained of consists exclusively of a breach of contract, or of something more. It appears to me that the wrongful pledging of the paper, whereby it became lost to the plaintiff, was an act of tort for which case will lie. That the defendant's conduct amounted to more than a mere breach of contract, is clear from this, that an action would lie for it in the absence of any contract between the parties. The objection that that which is here stated is only an informal and argumentative statement of a conversion, is answered by that which is alleged in the introductory part of the declaration, shewing that the plaintiff was not in immediate possession of the paper,

and that the defendant was lawfully in possession of it by the act of the plaintiff. It is rather like the case of goods coming to the possession of a man for a term; trover would not lie against him for refusing to redeliver them at the expiration of the term (128). That which is alleged here is properly I think the subject of an action on the case.

Judgment for the defendant.

(128) See *M'Kenzie v. M'Leod*, 4 M. & Scott, 249, 10 Bing. 385.

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COCKBURN and Another *v.* WRIGHT and Others, Executors
and Executrix of HENRY WRIGHT, deceased.

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ASSUMPSIT on a charterparty. The declaration stated, that, theretofore, and in the lifetime of the said Henry Wright, deceased, to wit, on the 25th March, 1836, a certain charterparty of affreightment was made and executed between the said Henry Wright as owner of the ship or vessel called the "Bengal" and the plaintiffs, under the firm of Messrs. J. Cockburn & Co. The charterparty was then set out, the substance of which was as follows:— That the ship, being tight, staunch, and strong, and every way fitted for the voyage, should with all convenient speed, sail and proceed to a loading berth in the London Dock, or so near thereunto as she might safely get, and there load from the factors of the said J. Cockburn & Co. a full and complete cargo of lawful merchandize, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so

By a charterparty it was stipulated that the ship should receive on board a cargo in the London Docks, and proceed therewith to Bombay and there discharge the same, and should then load a full and complete cargo, with which she should proceed direct to London, in consideration of a certain gross freight. The charterparty further contained the following stipulations—"the merchants to have the privilege of sending the ship to Calcutta from Bombay, they paying at the rate of 17*s.* per register ton per month for the extra time occupied," and also port-charges and pilotage at Calcutta;" and that, "if the ship returned from Bombay direct to London, the merchants to have the power of sending her to one port on the Malabar coast to receive cargo," paying as before for the extra time:— Held, that the owners, having discharged the outward cargo at Bombay, were not bound to take on board a cargo for delivery at Calcutta.

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loaded, *should therewith proceed to Bombay*, or so near thereunto as she might safely get, *and deliver the same, and there discharge the same, and should then load a full and complete cargo of lawful merchandise, with which she should proceed direct to London and discharge the same in such dock in the river Thames as the charterers might direct*: In consideration of which the charterers engaged to pay unto the said owner the sum of 2,350*l.*, in full and in lieu of all port charges and pilotage (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage, always excepted): the freight to be paid, 300*l.* at two months' date from clearing outwards at the Custom-House, London, and the remainder at two months' date from the delivery of the inward cargo: sixty running days were to be allowed the said merchants (if the ship were not sooner dispatched) for loading the ship at Bombay, and *ten days on demurrage*, over and above the said laying days, at 6*l.* per day: penalty for non-performance of the agreement, 2,000*l.*: the ship to sail from London on or before the 1st June: *the merchants to have the privilege of sending the ship to Calcutta from Bombay, they paying at the rate of 17*s.* per register ton per month for the extra time occupied*; the merchants also engaged to pay the ship's port-charges and pilotage at Calcutta: the cabin accommodations as then fitted to be for the sole use and benefit of the owner: the master to take an account of the marks, number, and description of the whole of the cargo received on board, and to measure all such goods as usually pay freight by measurement, and should furnish an account whenever the merchants or their agents might require it: *the cargoes* to be brought and taken from alongside at the risk and expense of the merchants: a gratuity of 25*l.* to be paid to the captain by the said merchants, provided the voyage should be performed to their satisfaction: cash for disbursements to be advanced

at Bombay free of commission: *if the ship returned from Bombay direct to London, the merchants to have the power of sending her to one port on the Malabar coast, to receive cargo, Messrs. Cockburn & Co. paying the ship's port-charges and pilotage, and 17s. per register ton per month for the extra time occupied.* [Mutual promises.] Averment that the plaintiffs, from the time of making the said charter-party, had performed and fulfilled all things therein contained on their part and behalf to be performed and fulfilled, and paid the said sum of 300*l.* in the said charter-party mentioned, according to the true intent thereof, and were ready and willing to advance cash at Bombay according to the true intent thereof, and that afterwards and in the lifetime of the said Henry Wright, and before the said 1st June, to wit, on the 20th May in the year aforesaid, the said ship or vessel, having received a cargo on board according to the charterparty, did set sail and proceed to Bombay aforesaid, in the East Indies, and afterwards and in the lifetime of the said Henry Wright, to wit, on the 6th November in the year aforesaid, arrived there, and delivered and discharged her said outward cargo to the agents of the said plaintiffs in that behalf, and the plaintiffs afterwards, and in the lifetime of the said Henry Wright, to wit, on the day and year last aforesaid, having procured a cargo of lawful merchandize in that behalf, within a reasonable time in that behalf, called upon and required the said Henry Wright, deceased, to load the same on board the said ship or vessel, and proceed therewith to Calcutta in the said charterparty mentioned; but the said Henry Wright, deceased, then wholly refused so to do (though he was not prevented by the act of God, the King's enemies, fire, or all or any of the dangers and accidents of the seas, rivers, and navigation of any nature or kind soever); and afterwards, and in the lifetime of the said Henry Wright, to wit, on the day and year last aforesaid, the said ship sailed and proceeded from Bombay

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aforesaid to Calcutta aforesaid, without any cargo whatever on board her, contrary to the tenor and effect of the said charterparty, and the promise and undertaking of the said Henry Wright, deceased, so by him made as aforesaid: That, by means of the premises, the plaintiffs had lost and been deprived of divers great gains and profits which they might and would have acquired and made by the carriage and conveyance of the said cargo from Bombay aforesaid, and the sale and disposal thereof, and had been deprived of the benefit of the said charterparty, and the profits and advantages which might and would have accrued and been derived therefrom, and divers large sums of money amounting in the whole to a large sum of money, to wit, 5,000*l.*, which they the plaintiffs had paid, and had been obliged to pay divers other sums of money amounting in the whole to a large sum, to wit, 5,000*l.*, which the plaintiffs were still liable to pay under and by virtue of the said charterparty, and had become and were wholly lost to the plaintiffs; and they were otherwise by means of the premises greatly injured and damnified, &c.

Second plea.

The defendant pleaded secondly—That, from the time of the arrival of the said ship or vessel at Bombay, and the delivery or discharge of her outward cargo, as in the declaration mentioned, and from thence continually until the said ship or vessel sailed and proceeded from Bombay aforesaid as therein also mentioned, he the said Henry Wright in his lifetime was ready and willing, and during that period, to wit, on the 6th November, 1836, tendered and offered to the plaintiffs to load and receive on board the said ship or vessel a full and complete cargo of lawful merchandize, or any lawful merchandize, to be carried and conveyed in the said ship or vessel *according to the said charter-party, to wit, to London aforesaid*; that the said cargo of lawful merchandize which the said Henry Wright was in the declaration alleged to have been called upon and required by the plaintiffs to load on board the said

ship or vessel, was a cargo which the said Henry Wright was by the plaintiffs called upon and required to load on board the said ship or vessel, to be carried or conveyed to and discharged at a certain port or place other than London aforesaid, or any dock in the said river Thames, that is to say, Calcutta, contrary to the charterparty, and that on that account and no other the said Henry Wright refused to load the said cargo on board the said ship or vessel as in the declaration mentioned; that, from the time of the arrival of the said ship or vessel at Bombay aforesaid, and from thence continually until she sailed and proceeded from Bombay aforesaid, as in the declaration respectively mentioned, the plaintiffs wholly neglected and refused to load on board the said ship or vessel a full and complete cargo or any part of a cargo of merchandize to be in the said ship or vessel carried and conveyed to London aforesaid, there or in any dock in the said river Thames to be discharged, and afterwards, and just before the said ship or vessel sailed and proceeded from Bombay aforesaid as in the declaration mentioned, to wit, on the 6th of November, 1836, informed the said Henry Wright in his lifetime that they refused and would not load on board the said ship or vessel any merchandize whatsoever, to be carried and conveyed to London aforesaid, there or in any dock in the said river Thames to be discharged, and then wholly discharged the said Henry Wright from any further detaining or keeping the said ship or vessel at Bombay aforesaid; wherefore the said ship or vessel sailed and proceeded from Bombay aforesaid without any cargo on board, in manner and form as the plaintiffs had complained—verification.

To this plea the plaintiff demurred specially; assigning for causes—that the plea was multifarious and double, and offered several and inconsistent defences to the said action—that it was not denied in and by the plea that the plaintiffs offered to ship a cargo in and on board the ship

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—that, by the terms of the charterparty, the said Henry Wright was bound to load a cargo at Bombay at the request of the plaintiffs, without regard to his liability afterwards to carry the same to one place or another—that the said Henry Wright was bound, under the terms of the charterparty, to load a cargo at Bombay, to be carried therein to the Malabar coast or to Calcutta, at the option of the plaintiffs—that the plea was no answer to the declaration, and neither traversed nor confessed and avoided the same—that, if the said plea was intended as a traverse of the declaration, or any material allegation therein, it ought to have concluded to the country—and that the plea was in other respects uncertain, insufficient, and informal.

The defendants joined in demurrer (129).

R. V. Richards (*Peacock* was with him), in support of the demurrer.—The question is, whether, under this charterparty, the outward cargo having been discharged at Bombay, and the freighters electing to send her to Calcutta, the owners were not bound to take on board a

(129) The points intended to be relied on for the defendants, were—That, on the true construction of the charterparty, the ship-owner, though bound to go to Calcutta in ballast, or with a part cargo to be discharged in the docks in the Thames, was not bound to take a cargo, or any part of a cargo, to Calcutta, for discharge there.

That, if the declaration meant that a full and complete cargo was tendered at Bombay, the ship-owner could not be required to go to Calcutta, such intermediate voyage being, according to the defendant's construction, nugatory.

That, as it did not distinctly ap-

pear on the declaration that the cargo tendered at Bombay was a complete cargo, or where the same was to be delivered, the defendants were compelled to shew by their plea that such cargo was to be discharged at Calcutta, and that, though the ship-owner refused such cargo, as not within the charter, he offered to take any goods to be discharged in the docks in the Thames, according to the charter; which being new matter, the plea was properly concluded.

And that the breaches assigned by the declaration were informal and insufficient, and the declaration in other respects informal.

cargo or part of a cargo on such intermediate voyage, pursuant to the proviso. It will be contended on the part of the defendants, that, if the charterers availed themselves of the privilege of sending the vessel to Calcutta, she must proceed thither in ballast. But this construction would render the proviso nugatory. As well might it be said, that, under a charterparty for time (nothing being said about loading a cargo), the owners are not bound to take in cargo. The intention of the parties manifestly was, that the outward cargo should be discharged at Bombay, and that the homeward cargo should be shipped at Bombay, or partly at Bombay and partly at a port on the Malabar coast, with liberty to the charterers to make an intermediate voyage to Calcutta, they paying the additional freight and charges.

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Bompas, Serjeant, contra.—The obvious meaning of the charterparty is that all cargo received, whether at Bombay, at Calcutta, or on the Malabar coast, shall be brought to London. The outward cargo was to be delivered at Bombay; and, if a full cargo was not obtained there, the charterers were to be at liberty to proceed either to Calcutta or to a port on the Malabar coast for the purpose of filling up.

R. V. Richards, in reply.—The charterparty expressly stipulates for the delivery of the outward cargo at Bombay. Unless, therefore, the owners were compellable to take in cargo there for Calcutta, the reservation of liberty to the charterers to send the vessel there would be perfectly idle.

Bosanquet, J.—This is an action upon a charterparty: and the question is whether the declaration, coupled with the plea, discloses a breach as complained of. The charterparty provides, in the first instance, that the ship shall take on board in the London Dock a cargo, and proceed

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therewith to Bombay, and there discharge the same, and receive on board a cargo direct for London. The voyage originally contemplated, therefore, was, a voyage from London to Bombay and back: in consideration of which the charterers engage to pay a gross freight of 2,350*l*. The charterparty then provides that the merchants shall have the privilege of sending the ship to Calcutta from Bombay, on payment of a certain sum per ton for the extra time occupied, and also the port-charges and pilotage at Calcutta. It further provides, that, if the ship returned from Bombay direct to London, the merchants should have power to send her to a port on the Malabar coast to receive cargo. The breach of which the plaintiffs complain, is, that, the vessel having arrived at Bombay, and there discharged her outward cargo, the master was required to take on board a cargo for Calcutta, but refused to do so, and sailed from Bombay to Calcutta without any cargo on board. To this the defendants plead, in substance, that, the outward cargo being discharged at Bombay, the master was ready and offered to take on board a return cargo *for London*, pursuant to the charterparty; that the cargo he was required to load was a cargo to be carried to and delivered *at Calcutta*, contrary to the charterparty, and therefore he refused to receive it; and that the plaintiffs refused to put on board a cargo or any part of a cargo at Bombay for London, wherefore the ship sailed from Bombay without any cargo. I am unable to find in the charterparty any stipulation whereby the owners were compelled to receive at Bombay a cargo to be delivered at Calcutta. As I understand the charterparty, it is, that the whole cargo—whether taken on board at Bombay, at Calcutta, or at a port on the Malabar coast, is to be carried to London and there discharged. I see nothing in it to authorize the employment of the vessel on an intermediate voyage, as is suggested on the part of the plaintiffs. Whether or not it

was meant to be contended, that, if the cargo tendered at Bombay had been delivered at Calcutta, the master would have been bound to take on board a third cargo at the last-mentioned place for London, does not very distinctly appear. I think the defendants were not under any obligation to take such a cargo as that which the master was required to receive; and consequently that they are entitled to judgment on the demurrer to their second plea.

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COLTMAN, J., was at Chambers.

ERSKINE, J.—I am of the same opinion. At the commencement of the charterparty, the contract appears to be for a voyage out to Bombay, and home to London direct. But afterwards a stipulation is introduced, that the merchants shall have the privilege of sending the ship thence to Calcutta. Now, it does not necessarily follow that the purpose for which this privilege was reserved to the charterers was to *deliver* any cargo: the purpose for which the vessel might be sent to Calcutta is not precisely expressed. If it had appeared on the face of the pleadings that Calcutta is a port in the East Indies, it might perhaps fairly have been inferred that the meaning of the charterparty was that the merchants should have liberty to send the vessel from Bombay to Calcutta with such part of her outward cargo as might not have been discharged at the former place; or, having discharged her outward cargo at Bombay, might send her to Calcutta to receive a homeward cargo. But we are not at liberty to assume that Calcutta is in the East Indies; and therefore we cannot infer that the purpose for which the right to send the vessel there was reserved to the charterers, was, the delivery of any cargo. Taking the whole of the instrument together, it appears to me that two voyages only were contemplated—the voyage out from London to the East

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Indies, and the voyage from the East Indies back to London: and that an intermediate voyage from Bombay to Calcutta was not within its contemplation.

MAULE, J.—The plaintiffs allege as a breach of this charterparty, that the defendants refused to proceed from Bombay to Calcutta with a cargo. The charterparty contains no express stipulation that the vessel shall go to Calcutta either with or for a cargo: the plaintiffs therefore were bound to shew that by necessary intendment there was a promise to do that which they charge the defendants with having failed to do. No doubt, if we were at liberty to import into this record our own knowledge and experience, that Calcutta is an outward and not an inward port, and that the custom is to make the intermediate voyage suggested, the construction for which the plaintiffs contend would be correct. But I think we are not at liberty to do so. It is enough to say that this charterparty contains no contract on the part of the defendants to do that which the plaintiffs complain has not been done.

Judgment for the defendants.

Saturday,
Jan. 18th.

SEELBY v. ELLISON.

The court refused to bring back the venue in an action for an assault and battery, from Lincolnshire to London, on a

THIS was an action for an assault and battery. In Michaelmas Term last—

Wilde, Serjeant, obtained a rule nisi to restore the venue

suggestion that the plaintiff had by lecturing on the corn laws made himself obnoxious to the land-owners and farmers of the county, and provoked the hostility of the local papers in the conservative interest, in which paragraphs had appeared commenting upon the circumstances out of which the action arose; that the plaintiff had been placarded at Lincoln as the farmers' enemy; and that the defendant was a major in the Lincolnshire militia, and connected with the conservative party in the county.

(which had been removed by the defendant, upon the usual affidavit, from London to Lincolnshire, where the alleged assault took place) to London. The affidavits upon which the motion was founded stated that the plaintiff, a person of liberal political sentiments, had been lecturing in the county of Lincoln against the corn laws; that the farmers and land-owners of the county were consequently much irritated and prejudiced against him, and had upon various occasions expressed ill-will towards him; that a placard alluding to him had been exhibited in the market place at Lincoln, on a market day, with these words—"Beware of Charles Silly and Co., the farmers' enemies;" that paragraphs had repeatedly appeared in the local newspapers, remarking upon the transaction out of which this action arose, and suggesting that the plaintiff deserved the treatment he had experienced; that the defendant was a major in the Lincolnshire militia, and closely connected with the conservative party in the county; and that, under these circumstances, the plaintiff was advised and believed that a fair and impartial trial could not be had in that county.

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Goulburn, Serjeant, and *Humfrey*, shewed cause.—The only ground suggested for bringing back the venue is so absurd as hardly to require an answer: it is that the plaintiff, who professes what are called *liberal* politics, made a speech upon the subject of the corn laws, that created such a sensation in a county that is about eighty miles in length and forty in breadth, and sworn to contain twelve thousand persons liable to be summoned as jury-men, that twelve unprejudiced and impartial men cannot be found therein to try his cause! The court will not countenance such a libel upon the county. It would be difficult to find any place where a subject of such vital importance to the interest of the community as that of the corn laws, has not been agitated. With respect to the

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newspaper paragraphs, there is not a suggestion that the defendant personally had anything to do with them. On the contrary, it is expressly denied that he had; and it is sworn that they were only inserted in answer to paragraphs that had appeared in the liberal papers, reflecting seriously upon the defendant.

Bompas, Serjeant, in support of the rule.—Ground enough is laid to induce the court to come to the conclusion that this cause cannot be fairly tried in the county of Lincoln. There scarcely can be conceived a subject of more bitter feeling and prejudice in an agricultural county than that of the corn laws. With regard to the newspaper paragraphs, if traced to the parties themselves, half their venom would be extracted.

BOSANQUET, J.—I am of opinion that the plaintiff has shewn no sufficient ground for bringing back the venue to London. The action is brought to recover damages for an assault—a personal injury, not connected with any sort of political discussion, not alleged to have been committed at a political meeting or on any public occasion. But it is suggested that the parties entertain different political opinions. If that were allowed to be a ground for changing the venue in an action that is not in itself connected with politics, the applications for that purpose would be innumerable. Seeing the extent of the county, and its immense population, I think there is not the least pretence for saying that a fair and impartial trial cannot be had in Lincolnshire. One of the grounds urged in support of the motion is, that paragraphs have appeared in some of the local newspapers calculated to excite a prejudice against the plaintiff, and that a placard reflecting upon him was exhibited in the market place of Lincoln on a very public occasion. But these are not grounds for depriving the defendant of a right the law has given him, unless it is shewn

that he has taken part in these newspaper discussions. That he has done so is positively denied. Besides, it is sworn, on the part of the defendant, that the insertion of these paragraphs was provoked by the publication in the liberal journals of statements bearing heavily on the defendant. To make this rule absolute would, I think, be creating a most inconvenient precedent.

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COLTMAN, J., was at Nisi Prius.

ERSKINE, J.—To entitle the plaintiff to bring back the venue, he must shew affirmatively that there exists reasonable ground for believing that a fair and impartial trial cannot be had in the county to which it has been removed. The ground set up is, that he has taken an active part in the discussion of a political question, and has thereby drawn upon himself the enmity of the land-owners and farmers of Lincolnshire. That the plaintiff and the defendant have advocated different sides of a political question is, to say the least of it, a novel ground for a motion of this sort. Equal prejudice with that suggested possibly might exist in London against the defendant and his political doctrines. There is nothing in the affidavits to connect the defendant with the publication of the newspaper paragraphs, or the exhibition of the obnoxious placard.

MAULE, J.—I am of the same opinion. It is not an uncommon thing for a man to entertain an exaggerated notion of the effect of his speeches, or for a newspaper editor to attach to his effusions more importance than they bear in the eyes of the rest of the world.

Rule discharged, with costs (130).

(130) See *Pybus v. Scudamore*, 7 Scott, 124.

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Tuesday,
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On the 2nd January, 1837, the plaintiff commenced an action of trover against the collector of Customs for the port of London, to recover the value of certain tobacco, the bill of entry of which the defendant had refused to sign, so as to enable the plaintiff to obtain it on payment of the lesser duty payable on wrecked goods. The time limited for bringing such an action expired on the 10th Februa-

ry. On the 13th May, the facts were stated on both sides in a case for the opinion of the court, one of the questions in the case being whether or not the plaintiff was liable in this form of action. The plaintiff suspended his proceedings, to await the decision of the court of Queen's Bench in a case pending in that court, which involved a similar question. That court, having in June, 1839, decided that an *action on the case* would lie for the non-feazance—the plaintiff, in the following Michaelmas Term, applied for leave to amend his *declaration* by adding a count in *case*:—The court, under the special circumstances, allowed the amendment.

LEGGE v. BOYD.

THIS was an action of trover brought against the collector of Customs for the port of London, to recover the value of certain tobacco, the bill of entry of which the defendant had refused to sign, so as to enable the plaintiff to obtain it upon payment of the lesser duty of 5*l.* per cent. upon the value, under the 3 & 4 Will. 4, c. 52, s. 50, and 3 & 4 Will. 4, c. 56, Sched. "Inwards." (131)

The tobacco in question had been originally imported into the port of London, whence it was re-shipped for Londonderry. In the course of her voyage thither the vessel on board of which the tobacco was shipped received so much damage from an accidental collision with another vessel, that she became unmanageable and drifted upon the coast of Devonshire, and was wrecked. The tobacco was taken out by salvors, and housed, and was afterwards

(131) The 50th section of the 3 & 4 Will. 4, c. 52, enacts, "That all foreign goods derelict, jetsam, flotsam, and *wreck*, brought or coming into the United Kingdom or into the Isle of Man, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to:" "Provided that all such goods as cannot be sold for the amount of duty due thereon shall be delivered over to the lord of the manor or other person entitled to receive the same, and shall

be deemed to be unenumerated goods, and shall be liable to and be charged with duty accordingly."

And by the schedule of Duties and Customs "Inwards," in the 3 & 4 Will. 4, c. 56, a duty of 5*l.* for every 100*l.* of the value is imposed upon—"Goods, wares, or merchandize, not being either in part or wholly manufactured, and not being enumerated or described, nor otherwise charged with duty, and not prohibited to be imported or used in Great Britain or Ireland."

sold to the plaintiff, who claimed to be entitled to enter it upon payment of the lesser duty above mentioned, on the ground of its being "wreck" within the meaning of the 50th section of the 3 & 4 Will. 4, c. 52. This claim was resisted by the defendant on the ground that the tobacco was not "wrecked *upon importation*," which alone was considered by the commissioners to fall within the statute.

The action was commenced on the 2nd January, 1837. The six months limited by the 3 & 4 Will. 4, c. 53, s. 107, for the commencement of any action against (among others) any person acting under the direction of the commissioners of the Customs, for anything done in the execution of his office, expired on the 10th February. On the 18th May, a case for the opinion of the court was stated and exchanged between the parties, the questions in which were, whether, under the circumstances stated, the plaintiff had tendered the proper amount of duty, and whether the defendant was liable to this action.

A case of *Barry v. Arnaud*, involving the substantial question intended to be raised in this case, standing for argument in the special paper in the court of Queen's Bench, the plaintiff suspended his proceedings. That case was argued in Easter Term last, and at the Sittings after Trinity Term the court delivered judgment, holding that the defendant was liable in *case* for refusing to sign the bill of entry, the proper duty being tendered—see 2 P. & D. 633, 10 Ad. & E. 646.

Martin, in Michaelmas Term last, obtained a rule nisi to amend the declaration by adding a count in *case*, alleging that the plaintiff was the owner of certain tobacco, being in a certain warehouse subject to the control and direction of the defendant as collector of the customs; that he tendered to the defendant a bill of entry for signature, and offered to pay the proper duty; that it was the defendant's duty to sign the bill of entry and receive the

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duty, but that he refused to do so: with a general allegation of damage.

Spankie, Serjeant, and *T. F. Ellis*, now shewed cause.—

The plaintiff has been guilty of such a degree of laches as to disentitle him to the favour he asks at the hands of the court. The motion in effect seeks to set up a new cause of action, which is never allowed—Tidd's Practice, 9th edit. 697, 8; Archbold's Practice, 7th edit., 1120. In *Green v. Mitton*, 4 B. & Ad. 369, 1 N. & M. 673, the plaintiff commenced his action in Hilary Term, 1831, and declared in trover; the parties went to issue, and the plaintiff was put under a peremptory undertaking to try in Michaelmas Term, 1832, having been advised that the action was misconceived, he moved for leave to substitute a count in detinue for that in trover, and add one in debt; and, though it was sworn that no new ground of action was contemplated, leave was refused. In *Conolly v. Finch*, Arch. Pr. 1121, the court of Exchequer, in an action for false imprisonment, refused to allow a count de bonis asportatis to be added to the declaration after the lapse of two terms. In *Cross v. Metcalfe*, 5 Ad. & E. 800, 1 N. & P. 232, the cause was referred at Nisi Prius, and a verdict taken for the plaintiff, subject to a reference: the arbitrator certified to the court, pending the reference, that it would be agreeable to the justice of the case to allow the plaintiff to amend his replication, by substituting de injuriâ, or some other replication which should put in issue all the allegations in the plea: but the court held that such amendment could not be allowed without the consent of both parties. In *Roberts v. Bate*, 6 Ad. & E. 778, where the defendants had pleaded in abatement the non-joinder of a co-contractor, the court of King's Bench refused to set aside the plea, or allow the writ to be amended, on the ground that the plaintiff was barred by the statute of limitations from bringing a fresh action. And Patteson, J., said: "The only case directly

in point is *Lakin v. Watson*, 2 C. & M. 685, 4 Tyr. 839, 2 Dowl. 633. In that case the court of Exchequer did allow the amendment; but, with all respect for that court, I cannot see why the amendment should be permitted for the purpose of saving the statute of limitations, more than on any other account." It is of the greatest importance to the regularity and correctness of the public accounts that claims of this description should not be permitted to slumber.

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Martin, in support of his rule.—Nothing is more common than for proceedings in a cause to be suspended until the decision of another case involving the same question is pronounced; and the doing so has never yet been held to amount to laches. And, unless the amendment introduces a new cause of action, its allowance is almost a matter of course. In *Jones, q. t., v. Edwards*, 3 M. & W. 218, the court of Exchequer allowed the declaration in a penal action (against a magistrate for acting without a qualification—an action that certainly was entitled to less indulgence than the present) to be amended after special demurrer, on the terms of the defendant's pleading *de novo*, and the plaintiff's undertaking to try at the next Assizes; although the declaration had already been once before amended on the plaintiff's application, and although the defendant produced affidavits that the plaintiff was a person in indigent circumstances, and that he (the defendant) was advised and believed that he had a good defence on the merits. Parke, B., there says: "I believe we are all of opinion that it is almost a matter of course to amend before trial, in penal as in other actions: the only established exception seems to be the case of unnecessary delay." Since the new rules of pleading, the courts have dispensed amendments with a liberal hand. In *Cross v. Kaye*, 6 T. R. 543, where the plaintiff was permitted to amend his declaration in a penal action, Lawrence, J.,

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says: "If the amendment prayed for had gone the length of introducing a new charge against the defendant, I should think it came too late, on account of the statute of limitations." But Lord Kenyon, in that case, as well as in *Steel v. Sowerby*, 6 T. R. 171, and *Maddock v. Hammet*, 7 T. R. 55, makes the allowance or disallowance of the amendment depend upon the diligence or the laches of the plaintiff, and the introduction or non-introduction of any new substantive cause of action. In *Horton v. The Inhabitants of Stamford*, 1 C. & M. 773, 2 Dowl. 96, 3 Tyr. 869, in an action against the inhabitants of a place for damage done by a mob, under the 7 & 8 Geo. 4, c. 31, the court allowed the proceedings to be amended by substituting "borough" for "hundred," there being no such hundred, and the time for commencing a fresh action having expired. "The application," says Bayley, J., "is, to prevent the cause going off otherwise than on the merits; and it would be gross injustice not to allow it." So, in *Lakin v. Watson*, 2 C. & M. 685, 2 Dowl. 633, 4 Tyr. 839, where, in an action by executors, the defendant had pleaded in abatement the non-joinder of one executor (who had not proved), the court allowed the proceedings to be amended, on payment of costs, as the statute of limitations would have been a bar to a fresh action. The amendment sought in *Roberts v. Bate*, 6 Ad. & E. 778, clearly was one that could not be allowed.

TINDAL, C. J.—I must confess I have during the progress of the argument felt very considerable doubt as to the propriety of allowing this amendment; the plaintiff having discovered, or having the means of discovering the error so long since as the 13th May, 1837. He should have applied to a judge then for leave to add a count: and I do not see that our refusal to permit him now to amend will deprive him of all remedy. But, inasmuch as there was a case pending in another court, which was supposed

to involve the same question as that in issue here, and which was only determined after the last Trinity Term, I am not disposed to hold that the plaintiff has been guilty of such laches that he ought to be deprived of the indulgence he seeks. But, though I consent to the amendment, it is with an express reservation of my opinion as to the statute of limitations.

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BOSANQUET, J.—Concurring in the opinion expressed by my Lord Chief Justice, I also desire to be understood as not assenting to this amendment on the ground that the time for bringing a fresh action has expired. The circumstance that has pressed upon me, is, that the state of facts was known to the defendant in May, 1837: and it is a strong thing to allow a plaintiff, after such a lapse of time, to shape his declaration with reference to facts with which he was at first acquainted. But, at the same time, it is to be observed that it is not proposed to make any alteration in the writ, which is adapted to the proposed count: and it does appear that the case of *Barry v. Arnaud* for a considerable time left it undecided what was the proper form of action. Under the special circumstances, therefore, I agree that the amendment may be allowed, on payment of costs.

ERSKINE, J.—As I am not prepared to say that the plaintiff has any other means of trying his title to the tobacco, I think it right that he should be allowed to amend. But, after the great delay that has taken place, I yield with considerable reluctance.

MAULE, J.—I concur with the rest of the court in thinking that the justice of this case requires that the amendment prayed should be allowed; and one consideration that influences me in coming to this conclusion, is, that the plaintiff would otherwise be deprived of his re-

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medy for the wrong of which he complains, that is, that the time for bringing a new action has passed. It certainly would be a strong thing to permit a writ to be amended by adding a plaintiff or a defendant. But here it is not proposed to do any thing of that sort: the writ is proper. The plaintiff does not seek to vary the state of facts agreed to in May, 1837; but to add a count in order aptly to raise the question then intended to be tried. All that we now allow, is, that the plaintiff may have an opportunity to try that question. *Doe d. Shelton v. Shelton*, 3 Ad. & E. 265, 4 N. & M. 857, is the converse of this case. There, a verdict was taken for the plaintiff in ejectment, subject to a special case, which stated that it was "the custom in the manor" in which the premises in question (being copyhold lands) were, that, where a copyholder, being a feme covert, surrendered, if the husband consented to the surrender, such consent should be expressed in the surrender and admission, and that, without his consent, the surrender was inoperative: and the court refused to amend the case, at the instance of the plaintiff alone, by the judge's notes, so as to limit it to a mere statement that the *common practice* was to enter the consent in the surrender and admission.

Rule absolute, on payment of costs.

Tuesday,
Jan. 21st.

DORRIEN and Others v. HOWELL.

A cause standing tenth in the written list at Nisi Prius, in which counsel had been instructed for the defendant, was at the instance

of the plaintiff's counsel called on at the sitting of the court as an undefended cause, without any notice to the defendant, and a verdict was taken for the plaintiffs. The court set aside the verdict, and granted a new trial, *without an affidavit of merits*—the costs to abide the event.

BOMPAS, Serjeant, on a former day in this term, obtained a rule nisi to set aside the verdict in this case, on the ground that it had been improperly called on out of its turn. The cause, it appeared, stood tenth on the list for

the day at the last sitting in London. Counsel had been instructed on the part of the defendant. But, at the sitting of the court, and before the arrival of the defendant's counsel, the cause was, at the instance of the plaintiff's counsel, and without notice to the defendant, called on and disposed of as an undefended cause, and a verdict taken for the plaintiffs for 65*l.* 12*s.* There was no affidavit of merits.

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Bramwell shewed cause.—The fact of a cause being in the written list at *Nisi Prius*, is notice to the attorney that it may be tried at any time in the course of the day: and therefore, where a cause had been for several days in that list, and was at length tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the court granted a new trial only *on payment of costs*—*Fourdrinier v. Bradbury*, 3 B. & Ald. 328. So, in *Blackhurst v. Bulmer*, 5 B. & A. 907, 1 D. & R. 553, where a cause stood in the paper considerably below the last cause mentioned in the written list affixed at the outside of the court, and was tried (being stated to be an undefended cause), the counsel for the defendant objecting to it, and declining to appear: it was held that the trial was regular, and the court refused a new trial, *there being no affidavit of merits*. "It may be doubted," says Abbott, C. J., "whether the modern practice of putting up written lists has not done more harm than good: but at all events it cannot be permitted that a defendant in any case shall prevent a judge from trying a cause in the printed paper that he may think proper, merely for the purpose of delay, or at least without shewing some substantial ground either of justice or convenience." In *Bland v. Warren*, 7 Ad. & E. 11, 2 Nev. & P. 97, it was held, that, if the marshal enters a cause as undefended, for the day on which undefended causes are taken, in Middlesex, the defendant, if he mean to defend it, must instruct counsel to appear on that day,

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and state that the cause is defended, or, at any rate, must give the plaintiff notice to that effect: and, in default of this, if the plaintiff try the cause as undefended, and obtain a verdict, the defendant, though upon affidavit of merits, will be allowed to set the verdict aside only *on payment of costs*.

Bompas, Serjeant, in support of his rule.—In *Fourdrinier v. Bradbury*, no counsel was instructed; in *Blackhurst v. Bulmer*, though instructed, he declined to appear; and in *Bland v. Warren*, the cause being entered in the list of undefended causes, it was the defendant's duty to give notice if he intended to defend. In *Aust v. Fenwick*, 2 Dowl. 246, where a cause which stood thirty off was taken out of its turn, as undefended, in the accidental absence of the defendant's attorney, no notice having been given that it would be taken as an undefended cause, the court set aside the verdict, and granted a new trial, *the costs to abide the event*; though there it appeared that no brief had been delivered. [*Bosanquet*, J.—Every cause in the list stands first.] That is, if those standing before it are fairly disposed of. The defendant was clearly entitled to notice that the plaintiff meant to have the cause called on as undefended.

PER CURIAM.—Let the cause be set down again; the costs to abide the event.

Rule absolute accordingly.

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TILLEARD and Another v. CAVE.

FORD v. CAVE.

The Rev. JAMES ELLICE, Clerk, v. CAVE.

*Thursday,
Jan. 23rd.*

ON the 23rd August, 1839, a writ of testatum fi. fa. in the cause of *Tilleard v. Cave* was lodged at the office of the agent of the undersheriff of Cornwall, with a direction to levy 1076*l.* 11*s.* 8*d.*, besides &c., and with an indorsement thereon stating that the defendant was the owner of several mines in the county of Cornwall; but with no other instructions. On the 26th August, a writ of fi. fa. in the cause of *Ford v. Cave* was also lodged with the same sheriff, indorsed to levy 5,000*l.* And on the 29th, a third writ was lodged, at the suit of the plaintiff in the third action, of *Ellice v. Cave*.

The court amended an order made by a judge at chambers under the interpleader act, at the instance of the execution-creditor; but directed the latter to pay the costs of all the parties who had appeared to oppose the rule nisi, with the exception of the sheriff.

Under these writs the sheriff seized property in and upon several mines to a very large amount. Having received notices of claims from several persons, as mortgagees of the mines and other property seized, the sheriff, on the 24th September, took out a summons calling upon the several plaintiffs and the claimants to appear and state the nature of their respective claims. Upon this summons the several plaintiffs attended before Maule, B., on the 8th October. Five claimants also attended, viz. William Richards, who claimed to be a mortgagee of some of the mines seized, for the sum of 20,000*l.*; William Richards and Frederick Hill, who claimed to be mortgagees, as trustees for Messrs. Vivian & Co., bankers, of Helston, of some of the mines seized, for 10,000*l.*; J. G. Cloves and others, who claimed to be mortgagees, as trustees under the defendant's marriage settlement, of some of the mines seized, for 20,000*l.*; Simon M'Gillivray, who claimed to be mortgagee of one of the mines for 6,500*l.*; and Messrs. Magor and others, who claimed to be mortgagees of an-

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other of the mines, for 2,500*l*. After considerable discussion the following order was made:—

“ Upon hearing counsel for the plaintiffs, and for William Richards, the claimant to the goods seized under the writs of *fi. fa.* issued herein by the sheriff of Cornwall, and upon hearing counsel for the sheriff, and upon reading the affidavits &c., and *by consent*, I do order that actions of trover shall be brought in her majesty’s court of Common Pleas at Westminster, in which the venue shall be laid in the city of London, to try the right to the before mentioned goods, in which actions the claimants shall be the plaintiffs and J. Tilleard and J. A. Tilleard shall be the defendants, and that the said J. Tilleard and J. A. Tilleard, on the trial of the said actions, shall admit a conversion of the said goods: and, by the like consent, I do further order that particulars of the plaintiff’s demand in the said actions shall be delivered with the declarations therein, and that the costs of the said actions shall be in the discretion of the said court of Common Pleas: and I further order that this my order shall be made a rule of the said court: and, by the like consent, I further order that the sheriff of Cornwall shall quit the possession of the said goods; but I order that he shall be at liberty to apply to the said court for the costs of possession, and shall have until further order to return the writs in the said several actions: and I further order that the claimants, Messrs. Magor and others, shall be parties to this my order.”

The sheriff accordingly withdrew from possession: and two actions were brought against the Messrs. Tilleard, the one at the suit of William Richards, the other at the suit of Richards and Hill. Application was made by the plaintiffs in the first action, to Maule, B., to rescind or to vary his order, upon a suggestion that it was not drawn up in the terms of the consent: but, the conflicting interests being so extensive, his lordship referred them to the court.

Wilde, Serjeant, in Michaelmas Term last—upon an affidavit detailing the above facts, and stating that William Richards, one of the claimants, who was in possession of one of the mines in question, called Wheal Friendship, had carried away and sold large quantities of ore which at the time of the levy were upon the surface; that it was not necessary for the Messrs. Tilleards to defend the said two actions as to all the property claimed; and that the sheriff had seized or might have seized under the execution at their suit property sufficient to satisfy the same, which was not claimed by the plaintiffs in the last-mentioned actions—obtained a rule calling upon the plaintiffs in the second and third causes above mentioned, and William Richards, the said William Richards and Frederick Hill, Simon M’Gillivray, Messrs. Magor and others, and J. G. Cloves and others, the respective claimants, and the sheriff of Cornwall, to shew cause why the order of Maule, B., should not be rescinded, and why William Richards mentioned or referred to in the said order should not deliver a statement to the plaintiffs in the first-mentioned cause of the ores raised from or lying upon the surface of the mines Great Wheal Fortune and Wheal Friendship, and seized by the sheriff, and of which the said Richards had possessed himself; and why he should not account to the said plaintiffs for the value thereof up to the amount of the levy directed by the writ of testatum fi. fa. in the said first-mentioned cause; or why the said order should not be amended, by directing an issue to be tried, whether, at the time of the delivery of the said writ to the sheriff, the goods and chattels claimed by the said claimants, or some or one of them, or so much thereof as would be sufficient to satisfy the said levy, or some and what part thereof, were not liable to be seized by virtue of the said writ; and why the said claimants should not give the said plaintiffs security to account for the value of any such

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goods which by the verdict might be found to have been liable to be seized under the said execution.

Hoggins appeared to shew cause, on behalf of *Richards* and *Hill*: *R. V. Richards* appeared for *Ellice*, the plaintiff in the second action; *Smith*, for *Magor* and others; *W. H. Watson*, for *M'Gillivray*; *Fitzgerald*, for *Cloves* and others; and *Butt*, for the sheriff. Each asked for costs as against the plaintiffs in the first action, at whose instance they were brought before the court.

Sir F. Pollock, in support of the rule, opposed the claims for costs. But—

THE COURT thought that all the parties who had appeared were entitled to costs, except the sheriff: and the following rule was ultimately drawn up:—

“It is ordered that the order of *Maule, B.*, be amended by directing, instead of the provision therein contained for bringing actions of trover, that an issue be tried in the county of Cornwall, wherein the plaintiffs in the first-mentioned action shall be plaintiffs, and *Richards* and *Hill* defendants, to try the question whether, at the time of the delivery of the writ of *fi. fa.* to the sheriff in the cause of *Tilleard v. Cave*, that is to say, on the 23rd August, 1839, or at any time thence until the time of his quitting possession under the said writ, that is to say, on the 11th October, 1839, the right of property in the ores raised from the several mines, or any of them, and then lying in or on the surface of such mines, had not passed to the said *Richards* and *Hill*, or either of them, under or by virtue of the indentures of mortgage mentioned or referred to in the affidavits; in which issue the plaintiffs shall affirm that the right of property in the said ores had not so passed, and the defendants in the issue shall affirm that it had; and

the plaintiffs shall affirm the value of the said ores to be 2,000*l.*, which affirmation the defendants shall deny: And it is further ordered that the said order be also amended by directing that the claims of the several other claimants (including the plaintiffs in the second and third causes) shall be barred: And it is further ordered that the costs of the parties so barred, of and occasioned by this application be paid by the plaintiffs in the first-mentioned action: And the court reserve the consideration of the sheriff's poundage, and the costs of the application as between the Messrs. Tilleards and Richards and Hill, and the costs of and occasioned by such issue, respectively, until after the trial thereof."

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v.
CAVE.

JONES v. CORRY and Others, Executors of WALTER WILKINS, Esq., Deceased.

THE plaintiff, a mason, had been employed by the testator in his life-time to build a mansion called Maeslough Castle, in the county of Brecon. The testator died on the 1st May, 1831; and his will was duly proved by the defendants on the 1st June following. On the 30th April, 1835, an action was commenced by the plaintiff, in this court, against the defendants, to recover a balance alleged to be due to the former for work and labour done in the life-time of the testator. By the particulars of demand delivered in this action on the 25th June and 27th July, 1837, the plaintiff claimed 766*l.* 5*s.* 4*d.*

On the 14th June, 1837, the plaintiff commenced a second action against the defendants, in the court of Exche-

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In 1835, the plaintiff commenced an action in this court against the defendants as executors of one W. W. (who died in 1831), for work done under a contract with the testator for the building of a mansion in Wales, and delivered particulars of his demand in July, 1837. In June, 1837, a second action was brought against

the defendants in the court of Exchequer, charging them personally in respect of work alleged to have been done since the testator's death: in this action also particulars were delivered. In 1838, both actions, and all matters in difference, were referred to arbitration. The award made by the arbitrator having in Hilary Term, 1839, been set aside, and the plaintiff finding that he could not support the second action, and conceiving that he could substantiate his claim against the defendants in the first action to a greater extent than charged in the particulars delivered therein, obtained in Trinity Vacation a judge's order to amend his particulars by adding thereto the items in respect of which the second action was brought:—The court refused to discharge the order.

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quer, charging them in their own right for work done since the death of their testator. By the particulars delivered in this second action the plaintiff claimed 95*l.* 6*s.* 6*d.* for work done between the 1st May and the 1st September, 1831.

By an order of *Nisi Prius* made at the Spring Assizes for the county of Brecon, in 1838, in the first-mentioned cause, both actions and all matters in difference between the parties and the heir of Walter Wilkins, who became a party to the reference, were referred to a barrister. The arbitrator made his award on the 22nd September, 1838, directing that the verdict in the first action should stand for 295*l.* 13*s.* 9½*d.*, and finding that the plaintiff had no cause of action against the defendants in respect of the second action (which he ordered to be discontinued); and with respect to the matters in difference between the plaintiff and defendants and the heir, he found that the plaintiff had no further demand or claim upon either of them; and he directed that the costs of the reference and of the award should be paid by the defendants and the heir in equal moieties.

In Hilary Term, 1839, this award was set aside by the court, at the instance of the defendants, on the ground that the arbitrator had exceeded his authority: see 7 Scott, 106, 5 New Cases, 187.

The award having been so set aside, and the action in the court of Exchequer being found incapable of being sustained, it became necessary for the plaintiff to proceed with the action in this court. Accordingly, in Trinity Vacation, an application was made to Lord Denman at Chambers, on behalf of the plaintiff, for leave to amend his particulars in the action in this court, by the insertion of additional items in respect of work alleged to have been done by the plaintiff for the testator in his life-time. The application was resisted by the defendants, as setting up new causes of action which were barred by the statute of

limitations, and including part of the sums claimed in the action still alleged to be pending in the Exchequer. His lordship, however, made an order for the amendment.

The amendment made in pursuance of this order consisted of the insertion of items amounting to 218*l.* 19*s.*, which had been contained in the particulars delivered in the second action, and of the addition of items amounting to 22*l.* 10*s.* 6*d.*, which had not before been claimed in either action. Upon an affidavit disclosing the above facts—

Wilde, Serjeant, in Michaelmas Term last, on the part of the defendants, obtained a rule nisi to set aside or to amend Lord Denman's order.—He submitted that it was unreasonable, after such a lapse of time, and in an action of this description, to permit the plaintiff to fasten upon the defendants a demand barred by the statute of limitations.

E. V. Williams now shewed cause.—The amendment allowed by the order of the noble lord is by no means unusual; nor does it impose any hardship on the defendants: it does not consist of the introduction of a new cause of action. In *Taylor v. Lyon*, 5 Bing. 333, 2 M. & P. 586, the declaration was amended by allowing the plaintiffs to declare, on the same cause of action, as surviving partners instead of administratrixes. Best, J., there says: "Questions of amendment are questions for the discretion of the court, which on such occasions is to be so exercised as to do justice between the parties." And in *Staples v. Holdsworth*, 4 New Cases, 717, 6 Scott, 605, the court allowed the plaintiffs to amend their particulars, in an action for money had and received by the defendant whilst in their employ as clerk or agent at Mexico, by the insertion of fresh items arising within the period embraced by the former particulars, though ten years had elapsed.

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F. Kelly and *Powell*, in support of the rule.—Amending particulars where the demand is so stale as the present is precisely like allowing a new action to be brought without giving the defendant an opportunity of pleading the statute of limitations. In *Staples v. Holdsworth*, the former particulars had been framed upon an account rendered to the plaintiffs by the defendant; and the court thought, that, as the plaintiffs had been deluded by the incorrect statement by the defendant of a matter that was peculiarly within his own knowledge, they ought not to be precluded from amending their particulars. That case, therefore, is no authority upon the present occasion. The defendants had by the former particulars notice of a certain limit to the plaintiff's demand. They may have dealt with the assets of their testator upon the faith of that knowledge; and therefore this order may seriously embarrass them. At all events, the plaintiff should be compelled to discontinue and to pay the costs of the action in the court of Exchequer.

TINDAL, C. J.—I think this rule should be discharged. In the first place, I think the court ought never, except on very clear grounds, to set aside an order made by a learned judge. This action is brought against the executors of one Wilkins who had entered into a contract with the plaintiff to build a house. The action was commenced in April, 1835. The particulars of the plaintiff's demand in this action were delivered on the 27th July, 1837. On the 14th June, 1837, a second action was commenced in the court of Exchequer, against the defendants in their individual character, the plaintiff mistakenly thinking that they were liable to him in that character for a portion of the work. The particulars in the first action were merely for the work done in the testator's life-time. Having discovered his mistake, the plaintiff now seeks to amend the particulars in the first action by adding thereto the claim

that formed the subject-matter of the second action. It does not appear to me that the allowing the amendment can impose any hardship or difficulty on the defendants. I think the order of Lord Denman is one that might be fairly and properly made.

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BOSANQUET, J.—I am also of opinion, that, in making the order in question, the noble lord exercised a sound discretion. The plaintiff has brought two actions—one against the defendants as executors of Wilkins—the other against them in their individual character. Finding that he cannot sustain the second action, the plaintiff now seeks to introduce into the particulars delivered in the first action, certain items that formed his particulars of demand in the second action. The defendants cannot be said to be taken by surprize, having already had the items before them. The argument as to the statute of limitations can have no application, the additional items being for the last portion of the work done by the plaintiff. It appears to me that the amendment was a reasonable one.

ERSKINE, J.—I am also of opinion that there is no sufficient ground for setting aside Lord Denman's order. The plaintiff is not seeking to introduce any new cause of action, but merely to add certain items to his particular of demand, conceiving that he has inserted therein less than he shall at the trial be able to prove to have accrued in the life-time of the testator. It is said, that, by allowing this amendment, the defendants are prevented from setting up the statute of limitations as a defence to these additional items. The courts have frequently allowed amendments where the statute otherwise would have barred the party's claim: but I never yet heard of an amendment being refused with a view to give effect to the statute. Nor is it any answer to the application to amend,

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that the plaintiff had brought another action for the recovery of the items here sought to be added.

MAULE, J.—By suing out his writ and declaring as he has done, the plaintiff has prevented the statute of limitations from being set up as a bar to his claim. I think the order for the amendment was properly made; and I think there should be more liberality in the allowance of amendments where the statute would otherwise bar the claim.

Rule discharged, with costs.

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LOHMANN v. G. ROUGEMONT and Another.

G. & Co., merchants at St. Petersburg, sent to the defendants, mer-

chants in London, an order for the purchase and shipment on their account of fifty cases of *Havannah* sugar, with directions to the defendants to draw for the amount upon the plaintiff at Hamburg. This order was afterwards countermanded, and another order was sent by G. & Co. to the defendants for twenty cases of *Brazil* sugar, for which they were instructed to draw upon the plaintiff. The last-mentioned parcel of sugars was accordingly shipped for G. & Co.; and, on the 6th October, 1835, the defendants drew upon the plaintiff at three months' date for the amount of the invoice. This bill was presented for acceptance on the 19th, and accepted generally. On the 21st, the plaintiff wrote to G. & Co., acknowledging the receipt of a duplicate bill of lading for the twenty cases of *Brazil* sugar, and debiting them with insurance thereon, at the same time observing that he had accepted the draft for the invoice price provisionally, under the guarantie of the drawers, assigning for reason that they (the drawers) had been accredited with him only for fifty chests of *Havannah* sugar, but not for *Brasil*, and requesting instructions on that account. On the 23rd the plaintiff also wrote to the defendants, telling them that he had accepted the bill for the present under their guarantie, as he had not yet received the "accreditiv," but that he had applied for it, and would inform them immediately when the matter was arranged. On the 30th, G. & Co., in answer to the plaintiff's letter of the 21st, wrote to him, saying that they credited him for the insurance of the twenty cases *Brazil* sugar, and requesting him to pay the defendants' draft for their account, and to release the defendants from their guarantie. On the 1st December, the defendants wrote to the plaintiff as follows:—"Since the 6th of last month we are deprived of your favours, and therefore also of the advice of your having acknowledged for account of G. & Co. our draft of the 6th October against the twenty chests *Brazil* sugar, which you had accepted in the interim under our guarantie: as we have in the meantime received from the said house the assurance that they had arranged the needful with you for the protection of the draft for their account, we should be glad to have this confirmed by you, and to be relieved from our guarantie." G. & Co. stopped payment on the 20th November. The plaintiff never did formally release the defendants from their guarantie; but paid the bill when at maturity:—Held, that, under the circumstances, the acceptance must be taken to have been an acceptance on account of G. & Co., subject only to their ratification, which being given the acceptance became absolute; and consequently that the plaintiff could not recover from the defendants the amount thereof as money paid to their use.

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that the plaintiff had brought another action for the recovery of the items here sought to be added.

MAULE, J.—By suing out his writ and declaring as he has done, the plaintiff has prevented the statute of limitations from being set up as a bar to his claim. I think the order for the amendment was properly made; and I think there should be more liberality in the allowance of amendments where the statute would otherwise bar the claim.

Rule discharged, with costs.

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LOHMANN v. G. ROUGEMONT and Another.

G. & Co., merchants at St. Petersburg, sent to the defendants, mer-

THIS was an action of assumpsit for money paid and on an account stated. Plea, non assumpsit. At the trial

chants in London, an order for the purchase and shipment on their account of fifty cases of *Havannah* sugar, with directions to the defendants to draw for the amount upon the plaintiff at Hamburg. This order was afterwards countermanded, and another order was sent by G. & Co. to the defendants for twenty cases of *Brazil* sugar, for which they were instructed to draw upon the plaintiff. The last-mentioned parcel of sugars was accordingly shipped for G. & Co.; and, on the 6th October, 1835, the defendants drew upon the plaintiff at three months' date for the amount of the invoice. This bill was presented for acceptance on the 19th, and accepted generally. On the 21st, the plaintiff wrote to G. & Co., acknowledging the receipt of a duplicate bill of lading for the twenty cases of *Brazil* sugar, and debiting them with insurance thereon, at the same time observing that he had accepted the draft for the invoice price provisionally, under the guarantie of the drawers, assigning for reason that they (the drawers) had been accredited with him only for fifty chests of *Havannah* sugar, but not for *Brazil*, and requesting instructions on that account. On the 23rd the plaintiff also wrote to the defendants, telling them that he had accepted the bill for the present under their guarantie, as he had not yet received the "accreditve," but that he had applied for it, and would inform them immediately when the matter was arranged. On the 30th, G. & Co., in answer to the plaintiff's letter of the 21st, wrote to him, saying that they credited him for the insurance of the twenty cases *Brazil* sugar, and requesting him to pay the defendants' draft for their account, and to release the defendants from their guarantie. On the 1st December, the defendants wrote to the plaintiff as follows:—"Since the 6th of last month we are deprived of your favours, and therefore also of the advice of your having acknowledged for account of G. & Co. our draft of the 6th October against the twenty chests *Brazil* sugar, which you had accepted in the interim under our guarantie: as we have in the meantime received from the said house the assurance that they had arranged the needful with you for the protection of the draft for their account, we should be glad to have this confirmed by you, and to be relieved from our guarantie." G. & Co. stopped payment on the 20th November. The plaintiff never did formally release the defendants from their guarantie; but paid the bill when at maturity:—Held, that, under the circumstances, the acceptance must be taken to have been an acceptance on account of G. & Co., subject only to their ratification, which being given the acceptance became absolute; and consequently that the plaintiff could not recover from the defendants the amount thereof as money paid to their use.

before Tindal, C. J., at the sittings in London after Hilary Term, 1838, a verdict was found for the plaintiff, damages 639*l.* 8*s.* 2*d.*, subject to the opinion of the court upon the following case:—

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The plaintiff in the year 1835 was and still is a merchant, carrying on business at Hamburgh. The defendants were then and still are merchants in London, trading under the firm of Rougemont Brothers. The plaintiff sought to recover the sum for which the verdict was given, as being the value of 7449: 9: 0 and 350: 10: 0 *marks banco*, Hamburgh money, which he alleges were paid by him on account of and for the honor of the defendants, under the following circumstances:—

The defendants, in and previous to the year 1835, acted as the commercial agents in this country of Guichart & Co. of St. Petersburg, and in that capacity were in the habit of executing shipping orders for Guichart & Co., and of drawing for their reimbursement upon the plaintiff in Hamburgh, with whom credit was opened by Guichart & Co., to meet the defendants' drafts. In accordance with this system of dealing, Guichart & Co. wrote to the defendants certain letters of which the following are extracts:—

"21 August, 1835.

"On the 11th of this month we remitted you 500*l.* on Baring Brothers & Co. against our draft of the 23rd of last month, the second of which was sent to you last post by Mr. J. C. Sievers, and received since then your esteemed letter of the 4th instant, with bill of lading and invoice of G. 8—18, eleven chests of Bengal Indigo, per David Wilton, Capt. D. Cook, for the amount of which we credit you per 28th of last month with 789*l.* 19*s.* 6*d.*, and debit you on the other hand, for your draft on Messrs. Ludwig Lohmann & Co. of Hamburgh of *banco f.* 3681, three months' date, at 13*f* 14½, with 265*l.*, taking note of your intention to draw for the other two thirds of the

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Guichart to defendants.

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shipments. We took the liberty of drawing upon you to-day—

B.f. 3144: 3, at 3 months' date, our own order, for account of J. B. Kempe & Co.
 7449: 9, do. do. do. . . Guichart & Co.
 8000: 0 } . . . do. do. do. . . C. Scheer & Co.
 8727: 13 }

B.f. 27321: 9 together.

which drafts we recommend to your kind protection, at the debit of the respective friends in St. Petersburg, who gave us orders to that effect."

Bill accepted.

The draft of the defendants on the plaintiff for *B.f.* 7449:9, for account of Guichart & Co., mentioned in the defendants' letter of the 6th October, 1835, and plaintiff's letter (after mentioned) of the 23rd October, 1835, was transmitted by post to Messrs. Leers & Co., the agents at Hamburg of the defendants, and was presented by a clerk in their employment to the plaintiff for acceptance on the 19th October, 1835. *The plaintiff accepted the bill.*

On the 23rd October—one post having left Hamburg for London between that date and the return of the bill to Messrs. Leers & Co. "accepted" as above stated—the plaintiff, in Hamburg, wrote to the defendants as follows:—

Oct. 23, 1835.
 Plaintiff to defendants.

"In reply to your esteemed of the 6th instant, by which you handed to us bills of lading of goods shipped per Ganges, Capt. J. G. Sinclair [enumerating them.]

"Against the said goods we have protected your drafts for account of J. B. Kempe & Co. and C. Sheer & Co. *But the one for B.f. 7449: 9, at three months, of the 6th October, for account of Guichart & Co. in St. Petersburg, we accepted for the present under your guarantie, as we have not yet received the 'accreditivè:' we have applied for it, and shall inform you immediately when the matter is arranged.*"

Oct. 27, 1835.
 Plaintiff to defendants.

"We can now advise you that Messrs. J. B. Kempe & Co. in St. Petersburg have acknowledged for their account

your former draft upon us for *B. f.* 6682 : 14, at three months from 25th September : and we hereby release you from your guarantie for the same."

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On the 27th October, the plaintiff wrote to the defendants as follows:—

"We have made use of the bill of lading for K. No. 39—50, twelve chests of Brazil sugar, shipped per Petersburg, Capt. A. Satow, for account of Messrs. J. B. Kempe & Co., at St. Petersburg, upon which we have effected insurance, and charge the same to the Petersburg friends. *Your draft against the same, B. f. 4076 : 14, at three months from 23rd October, own order, we have ad interim protected under your guarantie, as we are without any credit being opened for you. We have to-day applied to Messrs. Kempe & Co. on the subject, and shall inform you immediately when the matter is in order.*"

Oct. 27, 1835.
Plaintiff to defendants.

On the 6th November, the defendants wrote to the plaintiff, acknowledging the receipt of the last-mentioned letter, and stating—

"We observe with pleasure that Messrs. J. B. Kempe & Co. in St. Petersburg have acknowledged for their account our draft upon you for *B. f.* 6682 : 14, of 25th September, and that you have released us from the guarantie. We notice, however, that you had the kindness to accept for the present under our guarantie our draft of *B. f.* 7449 : 9, 6th October, for account of Messrs. Guichart & Co., in St. Petersburg : but have no doubt they will confirm the same for their account ; and expect your kind advice as soon as the matter is in order."

Nov. 6, 1835.
Defendants to plaintiff.

Between the 19th October, the date of the acceptance of the bill, and the 23rd of that month, that is to say, on the 21st, the plaintiff wrote to Guichart & Co., at St. Petersburg, the following letter:—

"We received from Messrs. Rougemont Brothers, in London, bill of lading for G. No. 1—20, 20 chests of Brazil sugar, shipped for your account per Ganges, Capt.

Oct. 21, 1835.
Plaintiff to Guichart & Co.

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J. G. Sinclair, upon which they directed us to effect the insurance, which we have done as per inclosed account, *for the amount of which, B. f. 350 : 10, you will please to credit our account.* At the same time, these gentlemen drew upon us against the same *B. f. 7449 : 9*, at three months from 6th October, which we have however provisionally accepted under the guarantie of the drawers, *because you had accredited these friends with us only for 50 chests of white Havannah sugar, but not for Brazil sugars:* and we request your instructions on that account."

On the 30th October, 1835, Guichart & Co. of St. Petersburg wrote to the plaintiff the following letter:—

Oct. 30, 1835.
 Guichart & Co.
 to plaintiff.

"We have received your esteemed favour of the 21st instant. It conveys to us insurance accounts for 20 chests of Brazil sugar per Ganges, *B. f. 350 : 10, for which you are credited:* it also contains advice of the draft upon you of Messrs. Rougemont Brothers, in London, for the amount of the above-mentioned 20 chests of sugar, for *B. f. 7449 : 9*, of 6th instant, at three months, *which we request you to pay for our account, and to release said friends from their guarantie.* The credit opened with you for the amount of 50 chests of white *Havannah* sugar you will please to consider as cancelled."

On the 1st December, the defendants wrote and sent to the plaintiff in Hamburg the following letter:—

Dec. 1, 1835.
 Defendants to
 plaintiff.

"Since our last respects of the 6th of last month, we are deprived of your favours, and therefore also of the advice of your having acknowledged for account of Guichart & Co., in St. Petersburg, our draft for *B. f. 7449 : 9*, of October 6, against the 20 chests of sugar, G. No. 1—20, per Ganges, which you had accepted in the interim under our guarantie. As we have in the meantime received from the said house the assurance that they had arranged the needful with you for the protection of the draft for their account, we should be glad to have this confirmed by you, *and to be relieved from our guarantie, as also from that*

relating to our draft upon you, of 28rd October, for account of Messrs. J. B. Kempe & Co., in St. Petersburg, for *B.f.* 4076 : 14, against the 12 chests of sugar per Petersburg. As you have effected the insurance upon both these parcels of sugar, you will please to take notice that we reserve to ourselves the right to any advantage that may accrue from the insurance policies for the owners of the goods, *until you are enabled to honor the said drafts for account of the respective friends.*"

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On the 20th November, 1835, Guichart & Co. stopped payment: and the plaintiff in Hamburg wrote on the 1st December, and subsequently, on the 4th December, in answer to the defendants' letter of the 1st December, as follows:—

Stoppage of
Guichart & Co.

"Whilst we refer to our last respects of the 23rd October, we have now to advise you that *we cannot release you from your guarantie for the draft drawn upon us for account of Messrs. Guichart & Co., in St. Petersburg, B.f. 7449 : 9, at three months from the 6th October, to your own order, as we shall not pay the same for the account of Guichart & Co.; but request you to make us the necessary reimbursement before maturity.*"

Dec. 1, 1835.
Plaintiff to defendants.

"In reply to your esteemed favour of the 1st instant, we must refer to our letter by last post, wherein we advised you that we could not acknowledge your draft for *B.f.* 7449 : 9, of 6th October, at three months, for account of Messrs. Guichart & Co. We debit you for this sum, and expect your reimbursement before maturity. On the other hand, we shall of course keep as a security for your account the policies upon the 20 chests of sugar against which said draft was drawn. We also debit you for the amount of the insurance with *B.f.* 850 : 10, as per note annexed.

Dec. 4, 1835.
Same to same.

"With your draft for *B.f.* 4076 : 14, for account of J. B. Kempe & Co., in St. Petersburg, it is all in order. *We have merely overlooked to release you from your guarantie on that account.*"

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This letter inclosed a letter from Sievers, the defendants' agent at St. Petersburg, to the plaintiff, on the subject of Guichart & Co.'s affairs.

On the 11th December, the defendants wrote and sent the following answer to the plaintiff's letter of the 4th:—

Dec. 11, 1835.
 Defendants to
 plaintiff.

"With respect to the draft drawn upon you by order of Guichart & Co. for *B.f.* 7449 : 9, due 6th January, we find it singular that Messrs. Guichart & Co., as well as Mr. Sievers, in their letters to us hitherto, do not in the most distant manner allude to the circumstance that you had not honored this draft for account of Guichart & Co.; so that they evidently take it for granted that this draft has been acknowledged by you at the debit of Guichart & Co. And in this view we are confirmed by the letter of Mr. Sievers which we received last post open through your medium. If you have written in that sense either to Sievers or Guichart & Co., we cannot of course consider your acceptance as valid in any other way than for the account of the latter.

"Upon this point we must request your explanation. And we take note in the meantime of what you mention respecting the insurance effected: but we cannot reply to that part of your letter before the above-mentioned point is cleared up; and merely confine ourselves to the observation that the charge for insurance naturally falls upon the goods."

To this letter the plaintiff on the 15th December, replied as follows:—

Dec. 15, 1835.
 Plaintiff to de-
 fendants.

"In reply to your esteemed letter of the 11th instant, we can only observe that we cannot conceive how Messrs. Guichart & Co. or Mr. Sievers could suppose that we should accept your draft for *B.f.* 7449 : 9, due 6th January, for account of the Petersburg house. But that is nothing to the purpose. And we must confess we are somewhat surprised that a respectable house like yours should even incur the appearance as if they wanted under a very paltry ex-

cuse to evade the fulfilment of their engagement. The matter is simply this—that, in order not to dishonor your signature, we accepted these *B. f.* 7449 : 9, under your guarantie, and have not released you from the same: consequently, you are bound to make us the reimbursement as debtors in your own name; and this reimbursement we must request from you without delay, as the day of maturity is close at hand.”

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When the bill became due, it was presented to the plaintiff, who paid it under the indemnity and professedly on account of the defendants, under protest.

Bill paid under protest.

The plaintiff also paid, on the 21st October, 1835, 350 : 10 marks banco, of the value of 25*l.* 19*s.* 7*d.* British money, for the insurance of the sugars mentioned in the letter of the defendants of the 13th October, 1835.

[The plaintiff objected to the admissibility in evidence of the correspondence above set forth, *between the defendants and Guichart & Co., and between the plaintiff and Guichart & Co.*; which correspondence had (on the application of the defendants to the Lord Chief Justice) been allowed to be inserted in the case, subject to its admissibility being disposed of in arguing the case. If not admissible in evidence, the court were to determine on the residue of the case.]

Objection to correspondence.

The question for the opinion of the court was, whether or not the plaintiff was entitled to recover from the defendants the said sums of money, or either of them, under the above circumstances: if so, then a verdict was to be entered for the plaintiff for such sum: if not, then a nonsuit to be entered.

Question.

W. H. Watson, for the plaintiff.—The bill in question was accepted for the honor and on account of the defendants. The defendants had notice on the 23rd October that it was accepted upon their guarantie; on the 6th November, they acknowledged that it was so; and nothing has since occurred between the plaintiff and the defendants

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to change the posture of affairs. It was not an acceptance conditional on Guichart & Co. (on whose account it purported to be drawn) acknowledging it as an acceptance for them, as will be contended on the part of the defendants; it was strictly and properly an acceptance for the honor of the defendants—the plaintiff not then having received the “accreditiv,” that is, not being in funds to meet the bill on account of Guichart & Co. The real course of dealing between the parties is shewn by the defendants’ letter of the 11th December, in which they write—“Guichart & Co. and Sievers evidently take it for granted that this draft *has been acknowledged by you at the debit of Guichart & Co.* If you have written in that sense either to Sievers or Guichart & Co., we cannot of course consider your acceptance as valid in any other way than for the account of the latter.”

Shee, Serjeant, for the defendants.—The circumstances out of which this question arises are briefly these:—The defendants, merchants in London, were in the habit of shipping goods to various mercantile houses at St. Petersburg, correspondents of the plaintiff’s house at Hamburg, valuing upon the latter from time to time for the amount. In August, 1835, the defendants received from one of the St. Petersburg houses, Guichart & Co., an order for fifty cases of *Havannah* sugar, with instructions to draw for the price on the plaintiff, *with whom they had been accredited*, at three months. On the 1st September this order was withdrawn: and on the 8th the defendants received from the same house a fresh order for 20 cases of *Brazil* sugar, to reimburse themselves for the amount of which they were directed to draw upon the plaintiff. This order was duly executed by the defendants, and the bill in question drawn for the amount of the invoice. On the 19th October, the bill was presented to the plaintiff for acceptance, and accepted generally and without condition or qualification. On the 21st October, the plaintiff wrote to Guichart & Co., acknowledging the receipt of the duplicate

bill of lading for the 20 cases of Brazil sugar, and *debiting them for the insurance*; at the same time observing that they had provisionally accepted the bill drawn by the shippers, under the guarantie of the latter—assigning for reason, “*because you had accredited these friends with us only for 50 chests of white Havannah sugar, but not for Brazil sugars;*” and requesting their instructions *on that account*. In answer to this, Guichart & Co., on the 30th October, acknowledge the advice of the draft in question, and request the plaintiff *to pay it for their account*, and to release the defendants from their guarantie: and they cancel the former credit on account of the 50 cases of Havannah sugar. On the 23rd October, four days after the acceptance of the bill, the plaintiff wrote to the defendants: and, supposing it possible for them then to alter the nature of their acceptance, the question that presents itself upon this letter, is, did they do so? or, if so, to what extent? This bill, says the plaintiff, “we accepted for the present *under your guarantie*, as we have not yet received the accreditive: we have applied for it, and shall inform you immediately when the matter is arranged.” The plaintiff’s letter of the 21st to Guichart & Co. shews what he understood and meant by “accreditiv.” That was his application for it; and the answer of the 30th communicated it to him. Supposing, therefore, the acceptance was at the time it was given a conditional or qualified acceptance, or became so in consequence of the plaintiff’s letter of the 23rd October, the two letters last referred to shew that the condition (if any) had been fulfilled, and the acceptance become absolute: the bill was accepted on account of Guichart & Co., subject to their sanction and approval; and it in due course received their sanction and approval. It is said that this was a mere acceptance for honor: but an acceptance for the honor of the *drawer* is a thing unheard of. The defendants’ letter of the 11th December, which is the only thing that is calculated to cast any doubt upon the character of the transaction, it must be observed, was written *post litem*

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motam, and in ignorance of that which had passed on the subject between the plaintiff and Guichart & Co.

W. H. Watson, in reply.—By the letter of the 23rd October the defendants were informed that the bill was accepted under their guarantie. That they never dispute. [*Tindal*, C. J.—In that letter, the plaintiff says he has accepted for the present under the defendants' guarantie, because he has not yet received the "accreditiv," but that he has applied for it. Then, see his letter to Guichart & Co., of the 21st, which explains what he means by "accreditiv:" he says—"we have provisionally accepted under the guarantie of the drawers, because *you had accredited* these friends with us only for 50 chests of white *Havannah* sugar, but not for *Brazil* sugars, and we request your instructions on that account."'] Had not the plaintiff the right, on receipt of that letter, to an option either to accept or to reject the authority? Besides, Guichart & Co. do not say—"We accredit Messrs. Rougemont with you for the 20 chests of Brazil sugar:" but they simply request the plaintiff to pay the bill on their account, and to release the defendants from their guarantie. No formal release was ever given, as was the case with respect to the acceptances on account of Kempe & Co., mentioned in the plaintiff's letters of the 23rd October and the 4th December.

TINDAL, C. J.—This is an action brought to recover the value of 7449 : 9 marcs banco, alleged to have been paid by the plaintiff to the use of the defendants. The question between the parties turns entirely on the correspondence set out in the case, and is, whether, at the time of the acceptance by the plaintiff of the bill of the 6th October, 1835, it was accepted for and on account of the defendants, or, under the circumstances disclosed by the several letters referred to, on account of Guichart & Co. If it was accepted on account of the defendants, the

amount is recoverable as money paid to their use. But, if it was accepted on account of Guichart & Co., the plaintiff can have no right of action against the defendants. It appears that Guichart & Co. had in August, 1835, sent an order to the defendants for 50 cases of white grained *Havannah* sugar, with instructions to draw for the amount upon the plaintiff's house at Hamburg, *with whom they* (the defendants) *had already been accredited*, at three months. This order was countermanded on the 1st September. On the 8th September, Guichart & Co. sent a fresh order for 20 chests of *Brazil* sugar, with instructions to the defendants to draw for the amount upon the plaintiff's house, under the usual conditions. These last-mentioned sugars were accordingly purchased by the defendants and shipped for St. Petersburg to the address of Guichart & Co. On the 6th October, the defendants transmitted to the plaintiff at Hamburg the invoice and bill of lading of these 20 chests, together with advice of their having that day drawn upon him for the amount—7449 : 9 marcs banco, at three months' date—"which we recommend to your kind protection *at the credit of the friends in St. Petersburg, who gave us orders to that effect*:" thus pointedly calling the plaintiff's attention to the wish of the defendants that the acceptance should be on account of Guichart & Co. The bill was presented to the plaintiff for acceptance and accepted generally on the 19th October: and on the 23rd (a post having intervened between the date of the acceptance and that day), the plaintiff wrote to the defendants thus—"The bill for *B.f.* 7449 : 9, at three months, of the 6th October, for account of Guichart & Co. in St. Petersburg, *we accepted for the present under your guarantie, as we have not yet received the accreditive*: we have applied for it, and shall inform you immediately when the matter is arranged." It is upon the terms of this letter that the question arises: we are called upon to say what was the intention of the plaintiff at the time he accepted the bill and wrote this letter—whether he

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accepted it under the defendants' guarantie until he should be in funds from Guichart & Co., or only until he should receive from them a confirmation of the transaction as an acceptance on their account. At the time, the plaintiff seems to have entertained a doubt whether he could properly debit with this bill, which was drawn specifically on account of a shipment of *Brazil* sugar, an account opened for a contract for *Havannah* sugar: and accordingly the expression he uses is—"we have not yet received the accreditive." On the 21st October the plaintiff had written to Guichart & Co. If he had written to them for funds to meet the bill, then it would seem clear that he did not intend to make himself personally liable. But if, on the other hand, he merely applied for a confirmation of the orders mentioned in the defendants' letter of the 6th October, he must be taken to have accepted the bill for the account of Guichart & Co., subject to his receiving from them the accreditive—a credit on account of *Brazil* sugar. In his letter to Guichart & Co., of the 21st of October (which is referred to in, and therefore is to be taken as a part of, his letter to the defendants of the 23rd), the plaintiff evidently treats it as a conditional acceptance on account of Guichart & Co. He states that he has provisionally accepted the bill under the guarantie of the drawers—not because he was not in funds from Guichart & Co.—but because Guichart & Co. had accredited the defendants with him only for *Havannah* and not for *Brazil* sugars, and therefore he requested their instructions *on that account*. Then, let us see the answer of Guichart & Co. On the 30th they write—"We have received your esteemed favour of the 21st instant. It conveys to us insurance accounts for 20 chests of *Brazil* sugar per *Ganges*, *B.f.* 850 : 10, *for which you are credited*: it also contains advice of the draft upon you of Messrs. Rougemont Brothers, in London, for the amount of the above-mentioned 20 chests of sugar, for *B.f.* 7449 : 9, of 6th instant, at three months, *which we request you*

to pay for our account, and to release said friends from their guarantie. The credit opened with you for the amount of 50 chests of white *Havannah* sugar you will please to consider as cancelled." What is that, in effect, but telling the plaintiff that the credit given (the 'accreditivè') in respect of *Havannah* sugars was to be considered as cancelled, and to be transferred to the account of a shipment of Brazil sugars. At this time it is clear that the insolvency of Guichart & Co. was not suspected. The question therefore is, whether the plaintiff and Guichart & Co. do not by these letters give a force and an explanation to the word "accreditivè" which it is impossible to get over. But the matter does not rest here. See how the same expressions are used in relation to similar transactions between the plaintiff and defendants and Kempe & Co. of St. Petersburg. In his letter of the 23rd October, the plaintiff says—"We can now advise you that Messrs. J. B. Kempe & Co. in St. Petersburg, have acknowledged for their account your former draft upon us for *B. f.* 6682 : 14, at three months from 25th September ; and we hereby release you from your guarantie for the same." This evidently refers to an acceptance given, under precisely the same circumstances as the present, on account of Kempe & Co. Further, in acknowledging a shipment on account of that firm, the plaintiff thus writes to the defendants on the 27th October :—"Your draft against the same, *B. f.* 4076 : 14, at three months from 23rd October, own order, we have ad interim protected under your guarantie, as we are without any credit being opened for you. We have to-day applied to Messrs. Kempe & Co. on the subject, and shall inform you immediately when the matter is in order." And in a subsequent letter of the 4th December, he again writes—"With your draft for *B. f.* 4076 : 14, for account of J. B. Kempe & Co., in St. Petersburg, it is all in order. We have merely overlooked to release you from your guarantie on that account." Alluding to the former of these transactions, the defendants, in their letter to the

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plaintiff, of the 6th November, say—"We observe with pleasure that Messrs. J. B. Kempe & Co. have"—not, *remitted funds*, but—"acknowledged for their account our draft upon you for *B. f.* 6682 : 14, of 25th September, and that you have released us from the guarantie." Looking at all these letters, it appears to me that the only sense that can be given to the word "accreditiv" is, the acknowledgment by Guichart & Co. of the defendants' draft on account of the shipment of Brazil sugar, in lieu of that of Havannah sugar, which had originally been contemplated. The subsequent letters, of the 1st and 11th December certainly tend to throw a little doubt upon the matter; but not to my mind sufficient to alter the opinion I have expressed upon the earlier correspondence. In the first of these the defendants write—"As we have received from Guichart & Co. the assurance that they had arranged the needful with you for the protection of the draft for their account, we should be glad to have this confirmed by you, and to be relieved from our guarantie. As you have effected the insurance upon the sugars, you will please to take notice that we reserve to ourselves the right to any advantage that may accrue from the insurance policies for the owners of the goods, until you are enabled to honor the said draft for their account." This is relied on, on the part of the plaintiff, as shewing an acknowledgment by the defendants of the subsistence of their guarantie: and stress was laid on the expression "arranged the needful," as if that must of necessity mean "had supplied funds to meet the bill." But I do not think that is a just inference: it evidently refers to the doubt introduced by the substitution of the one order for the other. Reliance is also placed on the defendants' reservation of their rights on the policies. That, however, is nothing more than a general notice to keep alive any claim they might possibly have in some uncertain event. Then, the letter of the 11th December is said to contain a distinct admission that the bill in question was accepted by the

plaintiff on account of the defendants. But I do not think that letter is by any means so clear and unequivocal as to override the understanding to be gathered from the earlier part of the correspondence. The defendants say—"Sievers and Guichart & Co. evidently take it for granted that this draft has been acknowledged by you at the debit of Guichart & Co. If you have written in that sense either to Sievers or Guichart & Co., we cannot of course consider your acceptance as valid in any other way than for the account of the latter." I see nothing in that letter to drive the defendants from their defence to this action, provided it is sufficiently made out by the whole preceding correspondence and the conduct and dealing of the parties that it was Guichart & Co. who were originally looked to by the plaintiff to reimburse him the amount of his acceptance. I think this does appear as the result of the whole, and consequently that the plaintiff is not entitled to recover.

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BOSANQUET, J.—I am of the same opinion. The facts are shortly these. The defendants, the London correspondents of Guichart & Co. of St. Petersburg, were in the habit of shipping goods on their account, and drawing for the amount on the plaintiff at Hamburg. In the beginning of October, the defendants shipped for account of Guichart & Co. 20 cases of Brazil sugar, advised the plaintiff of the shipment, and drew upon him for the value. The bill was presented to the plaintiff on the 19th of that month, and accepted; and on the 23rd the plaintiff wrote to the defendants the letter upon which the case mainly turns, in which he says—"The bill (describing it) we accepted for the present under your guarantee, *as we have not yet received the accreditive*: we have applied for it, and shall inform you immediately when the matter is arranged." Now, it is important to see that application to Guichart & Co. for what is called the "accreditivè,"

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and how it was answered. The plaintiff says—The draft “we have provisionally accepted under the guarantie of the drawers, because you had accredited these friends with us only for 50 chests of white *Havannah* sugar, but not for *Brazil* sugars: and we request your instructions on that account.” To this Guichart & Co. on the 30th answer—“We have received your favour of the 21st, containing advice of the draft upon you of Messrs. Rougemont Brothers for the amount of the 20 chests *Brazil* sugar, *which we request you to pay for our account, and to release said friends from their guarantie.* The credit opened with you for the amount of 50 chests of white *Havannah* sugar, you will please to consider as cancelled.” No further communication upon the subject took place between the plaintiff and the defendants until after Guichart & Co. stopped payment. The stoppage took place on the 20th November, and on the 1st December, ample time having elapsed for the plaintiff to gain intelligence of that fact, he wrote to the defendants, declining to release them from their guarantie, and requiring them to remit funds to meet the draft. The question appears to me to be simply this, whether, when the plaintiff accepted this bill, and stated the circumstances under which he did so, it is not obvious that his only doubt was whether or not the shipment of *Brazil* sugar was to be substituted for the *Havannah* sugar for which the defendants were already accredited with him by Guichart & Co. I think the acceptance was given subject only to the assent of Guichart & Co. to this substitution; and, that assent having been given, the plaintiff became bound to pay the bill for the account of Guichart & Co.

COLTMAN, J.—It appears that Guichart & Co. had accredited the defendants with the plaintiff for a shipment of *Havannah* sugars; that this order was not executed; but that a shipment was afterwards made of a smaller

quantity of Brazil sugars; and that the defendants, pursuant to instructions received from Guichart & Co., drew upon the plaintiff for the amount. The plaintiff, not considering himself authorized to accept this bill on account of Guichart & Co., wrote to the defendants, telling them, that, although he had accepted the bill, they must not consider it as an acceptance for account of Guichart & Co., he not having yet received the accreditive, and that he had applied for it. On receipt of the answer of Guichart & Co. acknowledging the acceptance for their account, it was undoubtedly the understanding of all parties that the acceptance ceased to be an acceptance upon the guarantie of the defendants. No formal release was necessary. The defendants' letters of the 1st and 11th December certainly give rise to a little difficulty. But it is to be observed that the defendants were not then aware of what had passed upon the subject between the plaintiff and Guichart & Co. Upon the whole I think the plaintiff's claim fails.

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ERSKINE, J.—I agree with the rest of the court in thinking that a nonsuit ought to be entered in this case. The acceptance originally was provisional only, but became absolute on the receipt by the plaintiff of Guichart & Co.'s letter of the 30th October. I do not think the position of the parties was at all varied by the defendants' letter of the 11th December, upon which so much reliance was placed in the argument on the part of the plaintiff. In answer to the plaintiff's letter of the 21st October, asking instructions as to whether the bill in question was to be considered an acceptance on their account, Guichart & Co. on the 30th accredit it as a bill drawn by their authority. Having received this confirmation from Guichart & Co., the plaintiff is silent until after their failure, and then seeks to be reimbursed by the drawers. I think he clearly is not entitled to recover.

Judgment of nonsuit.

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By a railway act it was provided, that, in any action to be brought by the company against any proprietor of any shares in the undertaking, to recover money due for calls, it should be sufficient for the company to declare that the defendant, being a proprietor of a share, or so many shares, was indebted to the company in so much as the calls in arrear should amount to, for a call, or so many calls &c., without setting forth the special matter; and that, on the trial, it should only be necessary to prove that the defendant, at the time of making the calls, was a proprietor of such share or shares as the action was brought in respect of, and that such notice was given as was directed by the act of such call or calls having been made, &c.: the clause then went on to define the requisite proof of proprietorship. In an action for calls, the court refused to allow the defendant to plead, in addition to never indebted, and that he was not a proprietor—that he had forfeited his shares, and received notice of such forfeiture, before the making of the calls in question—and that he had forfeited his shares and ceased to be a proprietor after the making of the calls and before the commencement of the action.

The LONDON and BRIGHTON RAILWAY COMPANY v.
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THIS was an action of debt brought by the directors of the London and Brighton Railway Company, to recover from the defendant calls due upon certain shares in the undertaking held by him. The defendant, who was under terms to plead issuably, obtained leave to plead several matters—first, never indebted—secondly, that the defendant was not proprietor of the shares in the declaration mentioned—thirdly, that, by non-payment of previous calls, he had forfeited his shares, and had received notice of the forfeiture from the company, before the making of the calls in question—fourthly, that he had forfeited his shares, and ceased to be a proprietor, after the making of the calls, and before the commencement of the action.

Talfourd, Serjeant, on a former day in this term, obtained a rule calling upon the defendant to shew cause why the third and fourth pleas should not be struck out, and why the defendant should not take short notice of trial for the adjourned sittings in London.—He submitted that the pleas in question were not issuable; and, if issuable, that they amounted to a mere argumentative denial of proprietorship; and that they were evidently intended to invite a demurrer, not shewing a complete forfeiture—the act under which the company was incorporated (132) requiring that

(132) 7 Will 4 & 1 Vict. c. cxix. The 146th section enacts, amongst other things, that, 'if any owner of any such share shall neglect or refuse to pay such his rateable proportion, together with

the directors should declare the shares forfeited, that they should give notice to the party, and that the forfeiture should be confirmed at a general meeting.

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the interest, if any, which shall accrue for the same, then, or at any time thereafter, it shall be lawful for the said company to sue for and recover the same in any of her majesty's courts of record, by action of debt or on the case, or by bill, suit, or information, or *the said directors may, and they are hereby authorized to declare the shares belonging to any person or corporation so refusing or neglecting to pay any such calls, together with interest, in manner last aforesaid, to be forfeited*, and to order the same to be sold subject to the provisions of this act: Provided, nevertheless, that no advantage shall be taken of any forfeiture of any share in the said undertaking, until notice in writing, under the hand of two directors, or the secretary or clerk of the said company, of such share having been declared by the directors forfeited, shall have been given or sent by the post unto or delivered to some inmate of the last or usual known place of abode of the owner of such share, or, in the case of a corporation, of the clerk of such corporation, nor until the declaration of forfeiture of the said directors shall have been confirmed either at a general or special general meeting of the said company, held after the expiration of three calendar months at the least from the day on which such notice of forfeiture shall have been given as aforesaid; and, after such declaration of forfeiture shall have

been confirmed by such general meeting or special general meeting, the said company by an order to be made at the same or any subsequent general meeting, or special general meeting, shall have power to order the said directors to dispose of the shares so forfeited, or any of them, in manner by this act directed; and the said directors may in that case sell and dispose of such shares at a public auction or by private contract, and together or in lots, or in such other manner, and for such price as they may think fit; and a declaration, pursuant to the said act of the sixth year of his late majesty's reign [5 & 6 Will. 4, c. 62], made by some credible person not interested, before any justice of the peace, or before any Master or Master extraordinary in the high court of Chancery, stating that such call had been made by the said directors, and that such notice had been given, and that such default in payment had been made in respect of the share so sold, and that the same share had been declared to be forfeited, and that such declaration had been confirmed in manner hereinbefore mentioned, shall be sufficient evidence of the facts therein stated; and the purchaser of such share shall not be bound to see to the application of his purchase-money, nor shall his title to such share be affected by any irregularity of proceeding in reference to such sale, but such

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Stephen, Serjeant, *contra*, submitted that it would be an act of injustice to preclude the defendant from shewing that he had ceased to be a proprietor of shares in the undertaking before the cause of action accrued, particularly as the company had the power of reimbursing themselves by the sale of the forfeited shares.

Talfourd, Serjeant, in support of his rule, contended that the pleas objected to were clearly unnecessary, inasmuch as proof of the fact of proprietorship at the time of the making of the calls was by the act (133) imposed upon the plaintiffs.

declaration and the receipt of the treasurer or any two directors of the said company, for the price of such share shall be sufficient evidence of title thereto for all purposes whatsoever."

(133) Which enacts — "That, in any action to be brought by the said company against any proprietor of any share in the said undertaking, to recover any money due and payable to the said company for or by reason of any call made by virtue of this act, it shall be sufficient for the said company to declare and allege, that the defendant, being the proprietor of a share, or so many shares (as the case may be), in the said undertaking, is indebted to the said company in such sum of money as the call or calls in arrear shall amount to, for a call, or so many calls, of such sum or sums of money, upon a share or so many shares, belonging to the said defendant, whereby an action hath accrued to the said company by virtue of this act, without setting forth the special matter; and on the trial of such action it shall only

*be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of such share or shares in the said undertaking as such action is brought in respect of, or some one such share, and that such notice was given as is directed by this act of such call or calls having been made, without proving the appointment of the directors who made such call or calls, or any other matter whatsoever; and the said company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, on such call or calls, unless it shall appear that the principal monies previously paid on any such share, together with such call, exceeded the sum of 50*l.* on each share of that amount, or that any such call exceeded 10*l.* for each such share, and so in proportion for any less share, or was made payable before the expiration of three calendar months from the day appointed for the payment of the last preceding call, or that calls amounting to more than 25*l.* in the whole*

PER CURIAM.—The third and fourth pleas are unnecessary, and contrary to the spirit and meaning of the act of parliament.

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had been made in some one year on a share of 50*l.* and so in proportion for a share of less amount; and, in order to prove that the defendant was a proprietor of such share or shares in the said undertaking as alleged, the production of the books in which the said company is by this act directed to enter and keep respectively the names and additions of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to, and an account of the names of the several corporations, and of the names and places of abode of the several persons who shall from time to time be entitled to shares in the said undertaking, shall be prima facie evidence that such defendant is a proprietor, and of the number and amount of his shares therein: Provided always, that nothing herein contained shall extend or be construed to extend to charge or make liable any person or persons, bodies

politic or corporate, who are or shall be proprietor or proprietors of the shares of the said company, or his, her, or their real or personal estate, with any debt or demand whatsoever due or to become due from the said company, beyond the extent of his, her, or their share or shares in the said company, any law, custom, or usage to the contrary thereof in any wise notwithstanding."

This clause very closely resembles the 84th section of the 6 Will. 4, c. xxix, the act incorporating the Southampton Dock Company, which was very elaborately considered in this court in the case of *The Southampton Dock Company v. Richards*, 1 Scott's New Rep. 219.

And see *The London Grand Junction Railway Company v. Freeman*, 2 Scott's New Rep. 1.

(134) See the *London and Brighton Railway Company v. Wilson*, and *The Same v. Fairclough*, ante, p. 347.

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SANSOM v. RHODES.

The defendant put up property for sale by public auction on the 18th September, subject (amongst others) to the following conditions—that the purchaser should pay down a deposit of 10 per cent. and sign an agreement for payment of the remainder of the purchase-money on or before the 28th November; that a proper abstract should be delivered within fourteen days from the day of the sale, and a good title deduced at the vendor's expense, having regard to the conditions; the conveyance to be prepared by and at the expense of the purchaser, and left at the office of the vendor's solicitors for execution on or before the 10th November; and that all objections to the title should be communicated to the vendor's solicitors within

THIS was an action by a purchaser against a vendor for not deducing a good title.

The declaration stated that the defendant, theretofore, *to wit*, on the 18th September, 1838, caused to be put up and exposed to sale by public auction, in lots, certain property, *to wit*, certain freehold property, ground-rents, improved rents, and other property situate in the county of Middlesex, and more particularly described in a particular of sale then published by the defendant, under and subject to certain conditions of sale, that is to say (among other conditions), that each purchaser should pay down immediately a deposit of 10*l.* per cent. in part of the purchase-money, and sign an agreement for payment of the remainder *on or before the 28th November, 1838*; all out-goings to be cleared to the 29th September, 1838, from which time each purchaser should be entitled to the rents and profits; and each purchaser should pay or allow interest at the rate of 4*l.* per cent. per annum on the amount of his purchase-money, less the sum deposited, from the said 29th September until the purchase should be completed, without prejudice to the right reserved to the vendor by the last of the conditions; that *a proper abstract should be delivered within fourteen days from the day of the sale, and a good title deduced at the vendor's expense, having regard to the said conditions*, but the deeds of conveyance and assignment, including any assignment of terms attendant on the freeholds, should be prepared by and at the expense of the respective purchasers, and left at the office of the vendor's solicitors for execution on or before the 10th

twenty-eight days after the delivery of the abstract. In an action by the purchaser to recover back the deposit, on the ground that the vendor had not deduced a good title by the 28th November:—Held, on special demurrer, that the declaration was bad for not averring that a reasonable time for deducing a good title had elapsed before the commencement of the action—the conditions of sale naming no specific time for *that* purpose.

November, 1838; that (the deeds of the property relating to other property of the vendor of greater value) the vendor would retain possession of the same, and enter into the usual covenants with the purchasers, at their expense, to produce, and furnish copies, &c.; that any objections to the title should be communicated to the vendor's solicitors within twenty-one days after the delivery of the abstract, and every objection not taken and so communicated within such period, to be deemed waived or not to be made, and in that respect time should be deemed of the essence of the contract; that the auction-duty of 7*d.* in the pound should be paid by the purchasers at the time of sale; that, if any error or misstatement should occur in the said particular, the same should not vacate the sale, but a proportionate allowance should be made, either by the vendor or purchaser, as the case might happen, according to the average of the whole purchase-money, as a compensation either way, such allowance or compensation to be ascertained by a reference to two persons or their umpire, one to be named by the purchaser, the other by the vendor, such two persons to appoint an umpire; and by the last of the said conditions it was declared, that, should the purchaser neglect, refuse, or fail to comply with those conditions, or to pay the remainder of the purchase-money at the time specified in the third condition [Nov. 28th], the deposit money should be forfeited, and the vendor should be at full liberty to resell the said property either by public auction or private contract, and the deficiency, if any, by such second sale, together with all charges attending the same, should be made good by the defaulter at that sale, as and for liquidated damages, without the necessity of previously tendering a conveyance to the purchaser—as by the said conditions of sale, reference being had thereto, will, amongst other things, more fully appear. Averment, that, on such exposure to sale as aforesaid, *to wit*, on the 18th September, in the year afore-

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That it did not appear that the 14 days for delivering the abstract, had elapsed.

That it was not averred that objections were communicated within 21 days after delivery of the abstract.

titled to a reasonable time to be allowed to him, within which reasonable time he might deduce a good title according to the said conditions; and that the count did not allege or state that a reasonable time or any time whatever was given or allowed to the defendant to deduce a good title, or that a reasonable time or any time had elapsed after the said day of sale and before the commencement of the action—that, although it appeared by the conditions of sale set forth in the count that the defendant had promised as such vendor as aforesaid that a proper abstract should be delivered within fourteen days from the day of the sale, and a good title deduced at his the vendor's expense, having regard to the said conditions; nevertheless it did not appear by the count that fourteen days or any other time had elapsed after the said day of sale and before the commencement of the action—and that, although it appeared by the said conditions of sale set forth and alleged in the count that the defendant as such vendor as aforesaid had stipulated and conditioned that any objections to the said title should be communicated to his the defendant's solicitors within twenty-one days after the delivery of the said abstract, and that every objection not taken and so communicated within such period should be deemed waived or not to be made, and in that respect time should be deemed of the essence of the contract; nevertheless that it did not appear by the said count that any objections were communicated to the defendant's solicitors within twenty-one days after the delivery of the said abstract, or at any time whatsoever, or that the said space or time of twenty-one days, or any other space or time, had accrued or elapsed after the delivery of the said abstract or after the said day of sale, and before the commencement of the action.

Bagley, in support of the demurrer.—By the conditions of sale as set out upon this record, the purchaser was to

pay down a deposit of 10 per cent., and sign an agreement for payment of the remainder on or before the 28th November; the abstract was to be delivered within fourteen days from the day of the sale, and a good title to be deduced at the vendor's expense; the conveyance to be prepared by and at the expense of the purchaser, and left at the office of the vendor's solicitors for execution on or before the 10th November; and all objections to the title were to be communicated to the vendor's solicitors within twenty-eight days after the delivery of the abstract. There is no agreement, either express or implied, on the part of the vendor, to deduce a good title by any particular day; therefore the law implies that he shall have a reasonable time for the purpose: and the declaration does not allege that a reasonable time had elapsed before the commencement of the action. Even where a day is stipulated for by the agreement, it is not to be very rigidly construed. Thus, in *Lang v. Gale*, 1 M. & Sel. 111, where, upon a sale of land on the 24th January, it was by the conditions of sale agreed that an abstract of title should be delivered to the purchaser within a fortnight from the date thereof, to be returned to him at the end of two months from that date, and that a draft of the conveyance should be delivered within three months from the said date—it was held that the condition for delivery of the draft of the conveyance within three months was not a condition precedent with respect to its delivery within the precise time (135). "It was not," says Bayley, J., "a condition precedent that the draft should be delivered by a particular day; for, I do not consider the precise time of the delivery as an essential ingredient in that condition, which was meant only to secure a delivery within a reasonable time." In *Boehm v. Wood*, 1 Jac. & W. 419, it was held

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(135) See Sir Edward Sugden's Purchaser, 10th edit., Vol. 1, p. remarks upon this case, Vendor & 403.

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that merely undertaking to deliver an abstract and possession at a particular time, does not make it of the essence of the contract. In *Seton v. Slade*, 7 Ves. 265, Lord Eldon says: "The title to an estate requires so much clearing and inquiry, that, unless substantial objections appear, not merely as to the time, but an alteration of circumstances affecting the value of the thing, or objections arising out of circumstances, not merely as to the time, but the conduct of the parties during the time, unless the objection can be so sustained, many of the cases go the length of establishing that the objection cannot be maintained." Here, no specific day being appointed for the completion of the title, the vendor was entitled, as in all other cases, to a *reasonable* time for the performance of his contract—*Fry v. Hill*, 7 Taunt. 397, and other cases. All the precedents will be found either to aver that, the contract was to be performed by a day certain, or that a reasonable time for that purpose had elapsed before the commencement of the action—see *Hodges v. The Earl of Litchfield*, 1 Scott, 443, 1 New Cases, 492; *Orme v. Broughton*, 10 Bing. 533, 4 M. & Scott, 417; Chitty on Pleading, 6th edit., Vol. 2, pp. 177, 178. [*Tindal*, C. J.—The purchaser was to sign an agreement to pay the remainder of the purchase-money on the 28th November: the abstract was to be delivered within fourteen days from the day of the sale; the purchaser was to have twenty-eight days from the delivery of the abstract, for communicating objections; and the conveyance was to be left with the vendor's solicitors for execution on or before the 10th November: does it not appear sufficiently that the 28th November was the day on which the whole was to be wound up?] The day named for payment of the residue of the purchase-money is not necessarily the day on which the title is to be completed; nor has the delivery of the abstract any relation to the completion of the title. Lord Eldon, in *Lord Braybroke v. Inskip*, 8 Ves. 436, says: "As to the question when

the abstract was complete—the abstract is complete whenever it appears, that, upon certain acts done, the legal and equitable estates will be in the purchaser. That may be long before the title can be completed.”

[The Court intimated an opinion that the declaration was bad, for not shewing that a reasonable time had elapsed, since the day of the sale, and before the commencement of the action, for the completion of the title; and they gave *Whateley* time to consider whether he would abide by the declaration or amend it.]

Whateley, declining to amend, proceeded to argue in support of the declaration.—By the conditions of sale, the 28th November is sufficiently pointed at as the day on which the title was to be completed; and therefore the question of reasonable time does not arise. The vendor undertakes that he will within fourteen days from the day of the sale deliver an abstract and deduce a good title. Deducing a good title must at least mean shewing on the face of the abstract that the party has good right to sell. [*Erskine*, J.—Lord Cottenham, in *Southby v. Hutt*, 2 Mylne & Cr. 207, held that it means something more.] Sir E. Sugden says—Vendor and Purchaser, 10th edit., Vol. 1. p. 402—“The time fixed is, at law, deemed of the essence of the contract; for, it is the duty of the seller to be ready to verify the abstract on the day on which it was agreed that the purchase should be completed: and if he have not the title-deeds in his possession, or the abstract set forth a defective title, the purchaser may resist the completion of the contract, and recover his deposit.” Again, p. 410—“If the vendor be not ready with his abstract and title-deeds at the day fixed, the purchaser may avoid the agreement at law. Thus in *Berry v. Young*, 2 Esp. 640, n., where, upon a sale it was agreed that a good title should be made out by the 10th of July; in the beginning of July the purchaser called on the vendor to shew him the title-deeds; but he not having

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them in his possession, gave the purchaser an abstract of the title, which did not contain any of the deeds: and although it was suggested that an application ought to have been made to the vendor at an earlier period, yet Lord Kenyon ruled otherwise, as the seller, he said, ought to be prepared to produce his title-deeds at the particular day." "If the vendor cannot verify his abstract at the time appointed (p. 417), or if he produce a defective title, and the purchaser bring an action for recovery of the deposit, the vendor having a title at the time of the trial will not avail him. Thus, in *Cornish v. Rowley*, 1 Selwyn's Nisi Prius, 8th edit., p. 183, where a purchaser sought to recover his deposit, it appeared that the abstract of the title began in the year 1803, and, after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry, it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said they were ready to make out a good title. Lord Kenyon said, that the vendor must be prepared to make out a good title *on the day when the purchase is to be completed*. Indulgence, he was aware, was often given for the purpose of procuring probates of wills, &c. But this indulgence was voluntary on the part of the intended purchaser. It is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract setting forth a defective title, the plaintiff [purchaser] may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favour of infants, femes covert, &c. As a good title was not made out at the day fixed, he should direct the jury to find a verdict for the deposit, with interest up to that day. And a verdict was found by the jury accordingly. So, in *Bartlett v. Tuchin*, 6 Taunt. 259, 1 Marsh. 583, assignees of a bank-

rupt sold an estate, and no time was fixed for completing the purchase. The purchaser, upon a supposed defect of title, abandoned the contract; *afterwards* the commission was superseded, and a new one issued, under which the same assignees were chosen: it was held that the purchaser might rescind the contract, for, at the time he gave notice of his abandonment of the contract, the assignees could not make out a good title. And in *Seaward v. Willock*, 5 East, 198, 1 Smith, 390; the facts were, that, upon a sale, it was agreed that the purchase-money should be paid on or before Lady-Day, 1803, on having a good title. The vendors were assignees of a bankrupt who claimed under a will. They thought that he had an estate-tail under the will, and that therefore they could make a title: but under the devise he only took for life, with contingent remainders over. The bankrupt, however, being heir-at-law of the testator, could make a title by levying a fine, and was willing to join; but these facts were not stated in the abstract delivered, or communicated to the purchaser until a fortnight before the Assizes. The court, after shewing that the bankrupt took only an estate for life under the devise to him, said, as it was stated that previous to the time fixed for payment of the money, and completion of the purchase, or indeed till near the time of the trial, no information was given to the purchaser that the bankrupt was heir-at-law of the testator, but the title of the assignees appeared to have been delivered in on the supposition of the bankrupt being tenant in tail, they thought that the defendant had failed in making good the agreement on his part; and that thereupon a right of action at law had accrued to the plaintiff." *Wilde v. Fort*, 4 Taunt, 334, is also an authority, that, if the vendor of an estate by auction does not shew a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not.

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TINDAL, C. J.—This is an action by the purchaser against the vendor of certain ground-rents, to recover back the deposit and auction-duty paid at the time of sale, and also damages for the non-completion of the contract. The breach assigned in the declaration is, that the defendant, not regarding the conditions of sale, nor his promise, did not deduce or make or procure to be deduced or made to the plaintiff a good title to the said ground-rents so bid for and purchased by him, regard being had to the said conditions, or otherwise, and had hitherto wholly neglected and refused so to do. To this there is a special demurrer, assigning for cause (amongst others), that it did not appear by the conditions or otherwise in the declaration that the defendant promised the plaintiff to deduce a good title *within any specified or limited time*; and that, in the absence of such promise to deduce a good title within a specified or limited time, the defendant was entitled to a *reasonable time* for deducing a good title, and the declaration did not allege that a reasonable time or any time whatever was given or allowed to the defendant to deduce a good title, or that a reasonable time or any time had elapsed after the day of sale and before the commencement of the action. The declaration states, that, on the 18th September, 1838, the defendant put up and exposed to sale by public auction certain ground-rents and other property, under and subject to certain conditions, one of which is, that a proper abstract should be delivered within *fourteen* days from the day of the sale, and a good title deduced at the vendor's expense, having regard to the conditions. These fourteen days would expire on the 2nd October. The next condition is, that any objections to title should be communicated to the vendor's solicitors within *twenty-eight* days after the delivery of the abstract (which would carry the time down to the 23rd October); and that every objection not taken and so communicated within such period should be deemed

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waived or not to be made. The conditions further provide that the conveyance shall be prepared by and at the expense of the purchaser, and left at the office of the vendor's solicitors for execution on or before the 10th November: *the residue of the purchase-money to be paid on or before the 28th November*. The question is, whether these conditions necessarily imply that the vendor was to deduce a good title on or before the 28th November, or whether it was not contemplated that time might be requisite to clear up the title, so as by possibility to carry it over that day. Undoubtedly, if the parties had stipulated for the deduction of title by a certain day, time would have been of the essence of the contract, and the vendor would have been bound to be ready by the day named. But there is no such stipulation: there is merely an agreement that the purchase-money shall be paid by the 28th November, and it is perfectly consistent with that, that all matters relating to the title might remain in fieri, for the purpose of satisfying doubts, the investigations consequent upon which might occupy a longer time. There does not therefore appear on the face of the declaration to have been any express stipulation that the vendor should deduce a good title by any specific time: and, if no express time was stipulated, the law will in this, as in every other case, imply that a reasonable time was intended. Inasmuch, however, as it is not alleged in the declaration that a reasonable time for deducing a good title had elapsed, I think the demurrer must prevail, and consequently that the defendant is entitled to judgment.

BOSANQUET, J.—I am of the same opinion. The declaration does not state any precise day upon which it was obligatory on the vendor to make out a good title, nor does it aver the lapse of a reasonable time. But it is contended that the conditions of sale amount to an agreement on the vendor's part to make out a good title on or before

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the 28th November. The conditions, which are set out in the declaration, provide that the purchaser shall pay down a deposit of 10 per cent., in part of the purchase-money, and sign an agreement for payment of the remainder on or before the 28th November. That is a condition binding on the purchaser, but it contains no stipulation as to what the vendor shall do. The question therefore is, whether the agreement on the part of the purchaser—not, to pay the residue on the day named, but to sign an agreement to do so—is to be construed as containing an implied obligation on the vendor to be ready to complete the purchase on that day. It appears to me that it cannot be so construed.

ERSKINE, J.—If it had appeared on the face of the declaration that the 28th November was the day fixed for the completion of the title, then, upon the authority of the cases cited, I should have been of opinion that the breach was sufficiently assigned. When I first looked at the declaration, it occurred to me that it was averred that the purchase was to be completed on that day. But, upon further consideration, I think it does not necessarily follow, that, because the purchaser was to sign an agreement to pay the residue of the purchase-money on the 28th November, the vendor was bound to deduce a good title by that day: and the absence of any positive allegation or of any necessary implication to this effect upon the face of the declaration, renders it bad on special demurrer.

MAULE, J.—I am also of opinion that the declaration in this case is bad for want of an allegation that the defendant was to complete the title by a given day, or that a reasonable time for that purpose had elapsed. Even the day of sale is left quite uncertain. And, supposing that, by deducing a good title, was meant a good title upon the face of the abstract, then it appears that the vendor had

fourteen days from the day of sale within which to deliver an abstract; and it is not shewn that these fourteen days from the day of sale had elapsed before the commencement of the suit. For anything that appears, therefore, the contract may not have been broken.

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Judgment for the defendant.

On the evening of the day on which the above judgment was pronounced, the plaintiff took out a rule to discontinue, which—

Bagley, for the defendant, now moved to set aside for irregularity.—He referred to Tidd's Practice, 9th edit., 679, 680.

THE COURT, after consulting the Masters, observed that the motion was unnecessary, seeing that the defendant was not estopped from availing himself of his judgment on the demurrer.

Rule refused.

WRAY v. BROWN.

TALFOURD, Serjeant, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why he should not give security for costs. The motion was founded upon an affidavit which stated, that the action was brought upon a promissory note for 5*l.* 10*s.* alleged to have been made by the defendant, payable to *the plaintiff*, and due on the 21st December, 1839; that the plaintiff had been three times discharged under the insolvent

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The court refused to compel the plaintiff to give security for costs, upon an affidavit that he had been bankrupt and thrice discharged under the insolvent debtors act; and that he was suing as trustee for a third person

who alone was beneficially interested in the subject-matter of the action.

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debtors act, first in August, 1827, again in July, 1831, and the last time in November, 1839; that he had also been bankrupt; that the action was brought by the plaintiff, as trustee of one Tether, to whom he had given the note as a collateral security for a debt of the like amount due from him to Tether—a statement of the transaction between the plaintiff and Tether appearing upon the schedule filed upon the plaintiff's last imprisonment; that the defendant had a good defence to the action upon the merits; and that security had been demanded and refused (136).

Spankie, Serjeant, shewed cause, upon an affidavit that the assignees, having no interest in the subject-matter of the action, had declined to sue on the note.—In *Snow v. Townsend*, 6 Taunt. 123, 1 Marsh. 477, the court refused to compel the plaintiff to give security for costs in an action brought by him after an assignment of his property under an insolvent act; the assignee refusing to sue. And in *Morgan v. Evans*, 7 Moore, 344, the court refused to require the plaintiff to give security for costs, although it was sworn that he was insolvent, and that the action was brought in his name for the benefit of J. S., who alone was beneficially interested in the result.

Talfourd, Serjeant, in support of his rule.—In *Heaford v. M'Knight*, 4 D. & R. 81, 2 B. & C. 579, the court of King's Bench compelled the plaintiff to give security for costs, where he had taken the benefit of an insolvent debtors act, after issue joined, but before notice of trial given. The Court there say: "We think this is a case in which security for costs ought to be given. The plaintiff having executed an assignment to the provisional assignee of all his estate and effects, he no longer has a right personally to interfere in recovering this debt; and, being insolvent,

(136) See *Fountain v. Steele*, 5 Dowl. 264; and see *Huntley v. Balmer*, 6 Scott, 247; 6 Dowl. 633.

if he should fail in the action, the defendant would have no remedy for his costs. We think that the plaintiff's assignee, and, if none has been chosen, some of his creditors, should give security for costs before the action ought to proceed." And in *Doyle v. Anderson*, 2 Dowl. 596, Patterson, J., on the authority of that case, required security from an insolvent debtor who proceeded with an action after executing an assignment, though no assignees were appointed. Here, the plaintiff cannot by any possibility have any interest in the action, and therefore ought not to be permitted to proceed without giving security.

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TINDAL, C. J.—It appears to me, that, as each of the grounds here urged for requiring the plaintiff to give security for costs, taken separately, is insufficient, so, taken together, they do not help each other. That the action is brought in the name of the plaintiff as trustee for a third person, is, according to the authority of *Morgan v. Evans*, no ground for compelling security (137): and *Snow v. Townsend* shews that insolvency is no ground for such a motion (138). The true principle that governs these cases is that laid down by Lord Kenyon in *Webb v. Ward*, 7 T. R. 296 (139). "It cannot," he says, "be laid down as a

(137) In *Day v. Smith*, 1 Dowl. 460, it was held, that, when the whole interest of a party in an award is assigned to another, the court will not compel the latter to give security for costs in an action brought by the former upon the award.

(138) Unless the insolvency (or the bankruptcy) take place after the commencement of the action, or the action is brought for the benefit of the assignees—*Webb v. Ward*, 7 T. R. 296; *Mason v. Polhill*, 1 C. & M. 620, 3 Tyr. 595,

2 Dowl. 61; *Doe d. Colnaghi v. Blick*, 5 Scott, 714. In *Taylor v. Montagu*, 2 M. & W. 315, where the plaintiff, after issue joined, became bankrupt, and made default, and his assignees declined to proceed with the suit, the court refused to discharge a rule for judgment as in case of a nonsuit, on a peremptory undertaking, unless security for costs was also given.

(139) In *Snow v. Townsend*, 6 Taunt. 123, the court say that *Webb v. Ward* has been much questioned.

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general rule, that an uncertificated bankrupt must in all cases give security for costs where an action is brought by him; that would be going much too far: each case must depend on its own circumstances. But it is fair to say, that, if the action be really brought for the benefit of the assignees, they should be responsible for the costs." I therefore think this rule must be discharged.

BOSANQUET, J., concurred.

ERSKINE, J.—Finding it to be clearly settled that the circumstance of the plaintiff having been discharged under the insolvent debtors act did not entitle him to come and ask for security for costs, the defendant adds another ground, viz. that the action is really brought for the benefit of a third person; but this was held, in *Morgan v. Evans*, 7 Moore, 344, not to be a sufficient reason for compelling the plaintiff to give security. I therefore agree that the rule must be discharged.

MAULE, J.—I think this case is governed by *Morgan v. Evans*, and that the defendant is not entitled to ask for security for costs. The note upon which the action is brought not being a *negotiable* security, the name of the payee was necessarily used.

Rule discharged.

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GORDON v. SMITH.

In Michaelmas
Term 1835, the
plaintiff demur-
red to one of the
defendant's

IN Michaelmas Term, 1835, a demurrer was delivered by the plaintiff to one of the pleas in this cause, and issues in pleas, and issues in fact were joined upon the rest of the record. The plaintiff never having demanded a joinder in demurrer, or taken any step in the cause, the defendant in January, 1840, obtained a judge's order to withdraw the plea that had been demurred to, and in this term moved for judgment as in case of a nonsuit:—Held, that there had been no default.

fact joined on other five pleas. The venue was laid in Surrey. The plaintiff never demanded a joinder in demurrer, nor did he take any step in the cause. On the 6th January in the present year, the defendant obtained a judge's order to withdraw the plea that was the subject of the demurrer, on payment of costs. These costs were paid on the 23rd instant.

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Bompas, Serjeant, subsequently obtained a rule nisi for judgment as in case of a nonsuit.

Atcherley, Serjeant, shewed cause.—The plaintiff has been guilty of no default which entitles the defendant to judgment as in case of a nonsuit; for, while the issue in law was depending, he could not be compelled to go to trial upon the issues in fact—*Paxton v. Popham*, 10 East, 366; *Butcher v. Kiernan*, 2 Marsh, 364.

Bompas, Serjeant, in support of his rule.—The plaintiff has clearly been guilty of a default: the issues in fact having been joined upwards of four years ago, and still remaining untried. [*Tindal*, C. J.—Whilst the demurrer remained upon the record undisposed of, the plaintiff was not bound to proceed to trial—*Butcher v. Kiernan*. The defendant should at least have waited one Assize (140).] The plaintiff is not in a condition to try at the next Assizes, not having given a term's notice of his intention to proceed. He should have demanded a joinder in demurrer.

TINDAL, C. J.—The not demanding a joinder in demurrer is no ground for moving for judgment as in case of a nonsuit. There has been no such default in proceeding

(140) See the cases collected in a note to *Doe d. Balls v. Margrave*, 2 Scott's New Rep. 213.

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to trial according to the course and practice of the court as is contemplated by the statute 14 Geo. 2, c. 17. The complaint is, that the plaintiff has not done that which, according to the course and practice of the court, he could not do. The defendant may take the cause down by proviso.

The rest of the court concurring—

Rule discharged.



GOLDSTONE and Another, Executors of ANNE TOVEY, Deceased, v. THOMAS TOVEY.

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In an action by executors for money alleged to have been paid by them to the use of the defendant, the latter, being advised that the probate of the will of the testatrix was essential to his defence, called upon the plaintiffs' attorney for a *written* undertaking to produce it at the trial: the latter refusing to give such undertaking, the defendant's attorney procured an *exemplification*:—Held, that he was not entitled, on taxation, to the expense of obtaining it.

THIS was an action of assumpsit brought by the plaintiffs, as executors of Anne Tovey, deceased, to recover the amount of a bill of exchange drawn by the testatrix and accepted by the defendant, and also a sum of 400*l.* alleged to have been paid by the plaintiffs as executors to the use of the defendant. At the trial, a verdict was found for the defendant, the proof as to the bill failing, and the jury believing that the notes in respect of which the 400*l.* was claimed were a gift from the testatrix to the defendant, who was her step-son. See a report, ante, p. 394.

The defendant's attorney, being advised that the probate of the will and codicil of Anne Tovey was material to his defence, called upon the plaintiffs' attorney to give an undertaking to produce it at the trial. The plaintiffs' attorney declined to give such undertaking, saying that he intended to produce the probate as part of the plaintiffs' case (141); and he afterwards obtained a judge's order for its admission by the defendant. The defendant's attorney

(141) The *state of the record* did not render the production of the probate on the plaintiffs' part necessary: but it *was* produced at the trial.

not choosing to rely upon the chance of the plaintiffs' producing the probate, obtained an *exemplification* thereof, the charge for which in his bill of costs was as follows:—

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"Attending proctor at Doctors Commons, bespeaking exemplification of the probate of the will and codicil of Mrs. Anne Tovey -	6 8
"Attending afterwards for and examining same and seeing it signed by the registrar, and seal affixed - - - - -	13 4
"Paid proctor's charge for exemplification, and solicitor's fees - - - - -	10 15 6"

The allowance of these charges on the taxation of the costs was objected to on the part of the plaintiffs, on the grounds, amongst others, that the exemplification was unnecessary after the order for the admission of the probate by the defendant, and that the plaintiffs might have been called upon by summons to admit an office copy. The Master, however, allowed the 6*s.* 8*d.* and the 10*l.* 15*s.* 6*d.*

Bompas, Serjeant, on a former day in this term, obtained a rule nisi for a review of the taxation.—He submitted, that the defendant should have called upon the plaintiffs, under the rule of Hilary Term, 4 Will. 4, s. 20, to admit the probate; and that, at all events, the obtaining an exemplification, when an office copy would have answered every purpose, was a wasteful expenditure of money.

Bingham, shewed cause.—It was essential to the defendant's case that the will should be before the jury: its production was not necessary to the plaintiffs' case, nor were they bound to produce it; and therefore it behoved the defendant to be prepared with proper secondary evidence. The rule of Hilary Term, 4 Will. 4, has no application: the costs the Master has allowed are, the costs of *obtaining* the exemplification, not the costs of *proving* the document.

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An office copy would be no evidence. [*Tindal*, C. J.—The defendant might have called some person from the Prerogative office to produce the act book, which is constantly done.] The exemplification was the only strict evidence, in the absence of the probate; and the obtaining it was rendered necessary by the unprofessional conduct of the plaintiffs' attorney in refusing to give the required undertaking. [*Tindal*, C. J.—The defendant had no right to call upon the plaintiffs' attorney for such an undertaking; though perhaps it would have been better that it had been given.]

Bompas, Serjeant, in support of his rule.—The obtaining an exemplification was clearly unnecessary. The defendant might have had the act book produced, or he might have obtained an office copy of the probate, and called upon the plaintiffs by summons, under the rule, which clearly applies, to admit it.

TINDAL, C. J.—It seems to me that the obtaining an exemplification was incurring an unnecessary expense. The defendant might have obtained an office copy, and then called upon the plaintiffs by summons to admit it. The matter must go back to the Master.

The rest of the court concurring—

Rule absolute.

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*Thursday,
Jan. 30th.*

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BY a memorandum of agreement made on the 18th December, 1838, between the plaintiff of the one part, and the defendant on the other part, it was agreed and covenanted, "That the plaintiff, in consideration of the sum of 3,500*l.*, and of an annuity of 300*l.* to be paid and secured in manner hereinafter mentioned, should assign and absolutely transfer, free from incumbrances, on the 1st January next, unto the defendant, all his right, title, benefit, property, and interest of and in the pin patent machinery, utensils, and implements of trade, stock, book-debts, securities, fixtures, and all other matters and things relating thereto, together with the said business; and also the lease of Light Pool Mills, and all benefit thereof for the remainder of the term; and also the lease of the house, warehouse, and hereditaments in King Street, Cheapside, London, together with the stock, furniture, and fixtures, and every other matter and thing in and about the same premises, and also the lease of the Priory in Woodchester, in the county of Gloucester, and the coach-house, stables, outbuildings, garden, orchard, closes, and hereditaments thereto adjoining; and also the lease, or an agreement for a lease, of a certain cottage, coach-house, lands, closes, gardens, fish-pond, and other hereditaments near to the said Priory, and recently taken by the plaintiff of Thomas Lediard, together with all the fixtures, furniture, household goods, plate, linen, china, trees, shrubs, and every property, matter, and

The defendant agreed to purchase of the plaintiff the goodwill of a manufacturing business, with all the machinery, premises, &c., for a sum of 3,500*l.*, payable by certain instalments, and an annuity of 300*l.* payable quarterly. The first two instalments, and the first quarterly payment of the annuity, being in arrear, the plaintiff brought an action to recover them. At the trial a verdict was found for the plaintiff, damages 10,000*l.*, subject to the award of an arbitrator to whom the cause and all matters in difference were referred—3,500*l.* to be paid by the defendant to the arbitrator on a certain day, to be paid out by the latter to

such of the parties as he might think fit; and the arbitrator to order and determine what he should think fit to be done by the parties respecting the matters in dispute. The 3,500*l.* was duly paid to the arbitrator: and he by his award directed that the plaintiff was entitled to have a verdict entered for him on the several issues joined in the cause; that the 3,500*l.* should be paid to the plaintiff; that the defendant should pay to the plaintiff the further sum of 2567*l.*, and the costs of the reference and award; and that the plaintiff should execute a release:—Held, that the award was good, though it did not distinguish how much was to be paid by the defendant in respect of the cause, and how much in respect of the matters in difference.

The defendant committed an act of bankruptcy on the 14th December, upon which a fiat issued on the 19th: the arbitrator (with notice of the act of bankruptcy, and of the fact of a docket having been struck) made his award on the 18th:—Held, no ground for setting aside the award.

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thing belonging or appertaining thereto, or being in and about the same, and every part thereof, with the privileges and advantages thereto belonging, except the furniture and articles in the Priory in the list signed by the parties, and which were the property of the plaintiff: That the defendant should give a warrant of attorney for securing to the plaintiff the sum of 3500*l.* on the 1st January next, and which was to be paid as follows, viz., 1,500*l.* part thereof, on the 25th February next, 1,000*l.*, other part thereof, on the 25th March next, and the remaining 1,000*l.* on the 1st July next, with interest at 4*l.* per cent. on the respective sums from the 1st January next: But it was expressly agreed and understood that the said warrant of attorney was not to be filed or docketted, nor was judgment to be entered up thereon, nor was any other proceeding to be taken thereon, or execution to be issued, until the said 1st July next, and then only in case of default of payment of any of the instalments before mentioned: and the said annuity of 800*l.* to be paid quarterly during the life of the plaintiff, on the usual Feast days, the first payment to commence on the 25th March next, and to be paid to the account of the plaintiff with the Bank of England: and *the said annuity to be secured on property of ample value, to the satisfaction of the solicitor of the plaintiff*: That the defendant should pay all debts due to Joseph Wartnaby on his own account, or as executor or administrator of his late son Joseph Wartnaby, and especially the sum of 1,400*l.*, or upwards, claimed by the said Joseph Wartnaby, and all expenses attending the same, and also all debts and liabilities of whatsoever description now owing by the firm or partnership of D. F. Tayler & Co., and save harmless the plaintiff from the same, and any expenses attending the same: That the defendant should pay all rents, taxes, rates, and outgoings due or to become due in respect of the premises before mentioned, and fulfil all covenants to be performed by the tenant: That the plaintiff should not

carry on any trade or business as a pin or needle manufacturer, or in the wire business, or any business connected therewith, except for the benefit of the defendant, and should allow the name of Tayler to be used in carrying on the business now conducted in the name or style of D. F. Tayler & Co., for so long a time as it might be deemed expedient by the defendant, and to use his best exertions to promote the same business: That the dissolution of the partnership was not to be inserted in the Gazette, or elsewhere, until the 1st March next: And that the expense of that agreement and the notice of dissolution should be borne equally by the plaintiff and defendant, and the expense of the securities and assignment by the defendant absolutely."

The plaintiff brought an action against the defendant upon this agreement. The breaches assigned in the declaration were, that the defendant did not give the warrant of attorney for securing the payment of the 3,500*l.* on the days in the agreement mentioned, or pay the 1,500*l.* on the 25th February, or the 1,000*l.* on the 25th March, 1839, or the 75*l.* due in respect of the annuity on the last-mentioned day, or in any manner secure the annuity.

The cause came on for trial at the last Assizes for the county of Gloucester, when a verdict was taken by consent for the plaintiff, for 10,000*l.*, the amount of damages laid in the declaration, subject to the award of an arbitrator, who was to settle the cause and all matters in difference between the parties. The order of reference provided, that the defendant should pay to the arbitrator on or before the 10th October then next 3,500*l.* on account, to be paid out by the arbitrator to such of the parties as he might think fit; that the arbitrator should make one or more award or awards as he might think fit; that, if the money was not paid as aforesaid to the arbitrator, judgment should be signed for the damages in the declaration, and execution to issue for 2,637*l.* and costs, and interest thereon from the 6th August then instant, together with

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the costs of the reference and of any award or awards the arbitrator might have made; that the arbitrator should order and determine what he should think fit to be done by the parties respecting the matters in dispute, who agreed to be bound and concluded by such determination, and remain contented and satisfied therewith, so as the said arbitrator did make and publish his award or awards in writing concerning the premises on or before the fourth day of the next Michaelmas Term; that the arbitrator should be at liberty to enlarge the time for making the same; and that the costs of the cause should abide the event of the said award or awards, to be taxed by the proper officer; and the costs of the reference should be in the discretion of the arbitrator, who should direct to and by whom and in what manner they should be paid.

The time for making the award having been duly enlarged, the arbitrator, on the 18th December last, made and published his award, as follows :—

Award.

“ I do order, award, and adjudge that the plaintiff is entitled to recover and to have a verdict entered for him on the several issues joined in the said cause. And I do find, order, adjudge, and determine that the plaintiff hath sustained damages by reason of the premises in the pleadings in the said cause mentioned, and also of the several other matters in difference and dispute between the said parties also referred and submitted to me, to the amount of 6,067*l.* And I do think fit and further order and determine that the said sum of 3,500*l.* so deposited with me as aforesaid, shall and may be paid to the plaintiff on account of the said damages so found due to him as aforesaid. And I do further award, order, and determine that the defendant do and shall pay to the plaintiff on the 21st January next, between the hours of one and two o'clock in the afternoon, at the Hall of the Law Institution in Chancery Lane, London, 2,567*l.*, being the balance of such damages so found due to him as aforesaid. And I do further award, order, and direct that the defendant do and shall pay to the

plaintiff all his, the plaintiff's, costs of and incidental to the said reference, to be taxed by the proper officer, and also the costs and charges of me the said arbitrator and of this my award. And I do also award and determine that the defendant do bear and pay all his own costs of and occasioned by the said reference and award. And I do further award, order, and direct, that, upon payment of the damages, costs, and charges to the plaintiff, he the plaintiff do forthwith, and when thereunto required, at the costs, charges, and expenses in all things of the defendant, execute and make unto the defendant a good and sufficient assignment, conveyance, and transfer, free from incumbrance, of all his the plaintiff's right, title, &c., of and in the pin patent machinery, &c., &c., according to the terms of the agreement made between the said parties on the 18th December, 1838. And, upon payment of all such damages, sum and sums of money, and of all and singular the costs, charges, and expenses as aforesaid, I do further award, determine, and direct that the plaintiff shall and do, on request, and at the expense, costs, and charges of the defendant, make and execute a good and perfect release to the defendant of and from an annuity of 300*l.* agreed to be secured by the defendant to the plaintiff for his life by the aforesaid agreement, but which has not been done, and also all arrears of the said annuity, and all claims and demands in respect thereof, so as perfectly and effectually to extinguish and put an end to the same and all arrears thereof, and also a full and effectual release of and from all other claims and demands whatsoever up to the date of the said order of reference. And I do further award and determine, that, upon the several subject-matters in difference referred and submitted to me, the defendant hath not any legal or equitable claim or demand whatsoever upon or against the plaintiff, nor hath the plaintiff any other legal or equitable claim upon or against the defendant save as appears by this my award. And, lastly, I do award and direct that the defendant shall, when there-

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unto requested by, and at the costs and charges of, the plaintiff, make and execute to him a good and effectual release of all claims and demands whatsoever up to the date of the said order of reference."

When the parties were before the arbitrator, the defendant's counsel objected to the arbitrator's awarding to the plaintiff the value of the annuity, and submitted that he was entitled only to such damages in respect of the annuity as he had sustained by reason of the same not being secured on property of ample value, pursuant to the agreement, and by the non-payment of the arrears. The defendant's attorneys had notice of the award on the 19th December.

Whateley, on a former day in this term, obtained a rule nisi to set aside the award, on the following grounds—first, that the arbitrator had awarded to the plaintiff a gross sum in respect of the cause and the matters in difference, without distinguishing how much was due in respect of each—secondly, that the arbitrator had exceeded his authority in awarding a gross sum to be paid as the value of the annuity—thirdly, that the defendant had become bankrupt before the award was made. He produced an affidavit stating that, on the 14th December last, the defendant committed an act of bankruptcy, as appeared by the depositions taken before the commissioner in bankruptcy; that, on the same day, a docket was struck against him (of which the arbitrator on the same day, and whilst the reference was pending, had notice); and that, on the 19th, a fiat issued, under which the defendant was duly declared a bankrupt, and assignees appointed.—In support of the first ground of objection he referred to *Martin v. Burge*, 4 Ad. & E. 973, 6 N. & M. 201. There, on the trial of a cause, a verdict was taken for 3,000*l.*, subject to a reference, the arbitrator to direct a verdict for the plaintiff or defendant as he should think proper, and to determine all mat-

ters in difference, except as to costs, the settlement of which was provided for by the order of reference: the arbitrator directed a verdict to be entered for the plaintiff (not saying for how much), and that the defendant should at a time and place named pay the plaintiff or his attorney 260*l.* 12*s.* 6*d.*: and the court set aside the award for uncertainty. "I am at a loss to say," said Lord Denman, "upon this award, whether the arbitrator meant that the 260*l.* 12*s.* 6*d.* should be substituted for the nominal verdict taken, or be paid in respect of matters in difference." And Littledale, J.: "The arbitrator should have stated for what sum the verdict was to be entered. He very likely meant that it should be for 260*l.* 12*s.* 6*d.*; but that is surmise." And with respect to the last ground, he submitted that the right to the 3,500*l.* passed to the assignees of the defendant, who were not bound by the reference; and he cited *Ex parte Kemshead*, 1 Rose, 149 (142), and *Marsh v. Wood*, 9 B. & C. 659, 4 M. & R. 504.

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R. V. Richards shewed cause.—1. *Martin v. Burge* has no application: there, the arbitrator was empowered to direct a verdict to be entered for the plaintiff or defendant, as he should think proper, but omitted to do so: here, the arbitrator was not to direct a verdict to be entered, but to settle the cause. The 3,500*l.* having been paid into the hands of the arbitrator, the matter, so far as the verdict was concerned, was at an end: all that remained was, to find the issues with a view to the costs, and to settle the cause. The court will not be astute to discover defects in an award, where substantial justice has been done—*Prentice v. Reed*, 1 Taunt. 151; *Smith v. The Festiniog Railway Company*, 4 New Cases, 23, 5 Scott, 255.

2. The awarding a gross sum as the value of the an-

(142) And See *Dod v. Herring*, 1 Russ. & Mylne, 153; 3 Sim. 143.

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nuity, clearly was not an excess of authority. All matters in difference were referred: and the arbitrator was to order and determine what he should think fit to be done by the parties respecting the matters in dispute. In *Dunn v. Murray*, 4 M. & R. 571, 9 B. & C. 780, which was an action upon a contract for services for a year, the defendant declared generally for wages, and specially for damages by reason of his having been discharged before the end of the year. All matters in difference in the cause were referred to an arbitrator. It was proved before the arbitrator that the plaintiff was dismissed from the service of the defendant before the expiration of the year, but no claim was made before him for compensation in damages for such dismissal: and the arbitrator, in assessing the damages, did not take such dismissal into his consideration, but merely awarded the sum due for wages down to the time of commencing the action. A second action having been brought for damages in respect of the improper dismissal, the court held, that, inasmuch as the claim *was within the scope of the arbitrator's authority*, and was not brought before him, it could not be made the subject-matter of a fresh action. That case is precisely in point. Besides, what right has the defendant to assume that the arbitrator has awarded the value of the annuity? That does not appear upon the face of the award.

3. The bankruptcy of one of the parties to the reference is no ground for setting aside the award. In *Andrews v. Palmer*, 4 B. & A. 250, where a case was referred by order of Nisi Prius, and after the reference, but before the making of the award, the plaintiff became bankrupt, it was held that this was no revocation of the submission, and that the arbitrator, having awarded a verdict for the defendant, had done right. *Haswell v. Thorogood*, 7 B. & C. 705, is an authority to the same effect. *Marsh v. Wood*, 9 B. & C. 559, 4 M. & R. 504, was an action for revoking the submission. Now, by the statute 3 & 4 Will. 4, c. 42,

s. 39, the authority of an arbitrator appointed under a rule or order is not revocable without the leave of the court or a judge. Besides, this is at all events a contract, dealing, or transaction protected by the 2 & 3 Vict. c. 29 (143): and the court will not, by deciding the matter upon affidavit, deprive the parties of an opportunity to take the opinion of a court of error upon the construction of that act. [*Lee and W. Alexander*, who were to have argued on the same side, were stopped by the court.]

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Talfourd, Serjeant, and *Whateley*, in support of the rule.—1. According to the authority of *Mortin v. Burge*, the award is clearly bad for not distinguishing how much was due in respect of the verdict, and how much in respect of the matters in difference. The arbitrator was to settle the cause—that is, by one of the ordinary modes. In *Doe d. Madkins v. Horner*, 8 Ad. & E. 235, 3 N. & P. 344, where an ejectment being brought on two demises, all matters in difference in the cause were referred by a judge's order, which directed that the costs of the suit and of the reference and award should abide the event of the

(143) Which enacts, s. 1, "that all contracts, dealings, and transactions by and with any bankrupt really and bonâ fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment

shall have issued, had not, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference."

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award; that the party in whose favour the award should be might sign judgment in the same manner as if the cause had been tried at Nisi Prius; and that, if it was in the plaintiff's favour, he might issue a writ of possession thereon, and proceed in the usual way for costs on such judgment. The arbitrator awarded that the plaintiff was entitled to the possession "of a certain part of the lands sought to be recovered," which he set out by boundaries. The award stated nothing as to the residue; did not say on which demise the plaintiff was entitled; and gave no damages: it was held that the award was bad, for not stating on which demise the plaintiff was entitled, and for not expressly deciding as to the residue (144).

2. The arbitrator exceeded his authority in awarding a gross sum in discharge of the annuity. The value of the annuity was not a matter in difference. [*Tindal*, C. J.—The failure of the defendant to give the security was one of the matters in difference.] The measure of damages at the trial would be the difference in value between an annuity secured on real property and an annuity unsecured. *Dunn v. Murray* was an essentially different case: there, there was but one entire contract; here, the contract was severable as each quarterly payment of the annuity should become due.

3. The effect of the bankruptcy of one of the parties to a reference, must depend upon the nature of the subject-matter referred. In *Andrews v. Palmer*, 4 B. & Ald. 250, the cause only was referred. In *Ex parte Kemshead*, 1 Rose, 149, proof upon an award made after an act of bankruptcy, was expunged. And in *Marsh v. Wood*, 9 B. & C. 659, 4 M. & R. 504, it was held, that, if one of two parties who have submitted disputes to arbitration become bankrupt, if all his interest in the matter in dispute pass to the assignees, the other may revoke the submission without being liable to an action; for, the submission

(144) And see *Ross v. Boards*, 8 Ad. & E. 290, 3 N. & P. 382.

was no longer mutual, and therefore was not binding. "Where," says Lord Tenterden, "the original submission is not binding on all the parties, it binds none; and, upon the same principle, if, by matter arising subsequently, the submission ceases to be binding upon one of the parties, it is void in toto." What effect would the bankruptcy here have upon the 3,500*l.* deposited with the arbitrator? The mere placing it in the arbitrator's hands did not operate a change in the property.

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TINDAL, C. J.—It appears to me that the objections that have been urged against the validity of this award are satisfactorily answered. 1. The first objection is, that the arbitrator has awarded to the plaintiff a gross sum, without distinguishing how much was given in respect of the cause, and how much in respect of the matters in difference. I agree that, if this case had in its circumstances resembled that of *Mortin v. Burge*, there would have been ground for setting aside the award. But it seems to me that the peculiar circumstances out of which this arbitration arose, and the terms of the reference, sufficiently distinguish it from that case: and no possible injury could result to the defendant from the mode in which the award is made. When the cause came on for trial, it was agreed that a verdict should be taken for the plaintiff for the amount of damages laid in the declaration, 10,000*l.*, subject to an award, the arbitrator to settle the cause and all matters in difference between the parties: and it was ordered that the defendant should pay to the arbitrator on or before a given day the sum of 3,500*l.*, in default of which judgment was to be signed for the damages in the declaration, and execution to issue for 2,637*l.*, with costs and interest: and the arbitrator was to order and determine what he should think fit to be done by the parties respecting the matters in dispute. The award recites that the defendant paid the 3,500*l.* into the hands of the arbi-

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trator according to the terms of the order of reference; consequently the only mode in which the plaintiff could take advantage of the verdict nominally entered for him is obviated, because the event that was to entitle him to issue execution has never happened. The arbitrator then proceeds to adjudge that the plaintiff is entitled to a verdict on the several issues joined in the cause; and that he has sustained damages by reason of the premises in the pleadings in the cause mentioned, *and also* of the several other matters in difference and dispute between the parties, to the amount of 6,067*l.*; and he appropriates the 8,500*l.* so deposited with him to the plaintiff on account of the damages so found due to him, and orders that the defendant pay to the plaintiff, at a time and place named, the balance of such damages, 2,567*l.* It appears to me, from the award, as far as I have now gone, it is utterly impossible that the plaintiff could ever have availed himself of the verdict that has been entered, on the very grounds that are apparent on the face of the award itself. The arbitrator then proceeds to direct that the costs of the reference and award shall be paid by the defendant; and that, upon payment of the damages and costs, the plaintiff shall execute a conveyance to the defendant of the premises that were the subject of the agreement, and a release from all claims in respect of the annuity or otherwise. Has not the arbitrator, within the meaning of the order of reference, settled the cause and all matters in difference between the parties? It appears to me that he has literally followed the directions of the order, that the award is final, and that, when the release directed by the arbitrator has been given, there will be no possibility of any future recourse being had by the plaintiff against the defendant, either in respect of the cause or in respect of the matters in difference referred.

2. The second objection is, that the arbitrator has exceeded the authority given to him by the order of reference, in

awarding to the plaintiff a gross sum as the value of the annuity. I agree that, where a party has brought an action merely for the arrears of an annuity, a reference of the cause, and even of all matters in difference, would not give the arbitrator power to award to the plaintiff the value of the annuity, and thus throw so large a burthen on the defendant. But that is not this case. By the agreement the defendant contracted, not only to pay the plaintiff a certain yearly sum, but also to secure the annuity on property of ample value, to the satisfaction of the plaintiff's solicitor. The declaration contains two breaches—first, that the defendant neglected to give the warrant of attorney in the agreement mentioned, or to pay the instalments of 1500*l.* and 1000*l.* due respectively on the 25th February and 25th March, 1839—secondly, that he did not pay the instalment of the annuity which became due on the 25th March—thirdly, that he had not, though a reasonable time for that purpose had elapsed, given security according to the terms of the agreement. When, therefore, the parties were before the arbitrator, one of the matters in difference between them was, that the defendant had not given the required security: and, as the order stipulates that the arbitrator shall order and determine what he shall think fit to be done by the parties respecting the matters in dispute, it seems to me that he was acting within the scope of the authority given to him, in awarding as damages to the plaintiff the value of the annuity, on finding, as we may assume he did, that there was no sufficient security within the defendant's power.

3. The third objection to the award is, that the defendant became bankrupt before the award was made. The contention on the part of the defendant is, that bankruptcy is a revocation of the authority of the arbitrator. In the first place, it is by no means clear upon the affidavits that are before us that the defendant *has* become bankrupt, the fact not being precisely and pointedly sworn

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to, but only a loose reference made to certain supposed proceedings, which are not before the court. If opportunity were afforded, that which is alleged to be an act of bankruptcy might perhaps admit of explanation. At all events, it is far too grave a point for us to decide upon motion. The plaintiff ought to have an opportunity to raise the question in a more formal way, by bill of exceptions or special verdict. Upon the whole, I think no sufficient ground has been shewn for setting the award aside.

BOSANQUET, J.—I am of the same opinion. The first objection is founded upon the case of *Martin v. Burge*. But that case is altogether different from the present. There a verdict was taken for the plaintiff, damages 3,000*l.*, subject to the award of an arbitrator, who was empowered to direct a verdict to be entered for the plaintiff or defendant, as he should think proper, and to whom all matters in difference between the parties were referred, to order and determine what he should think fit to be done by each of them respecting the matters in dispute. The arbitrator made no award as to the verdict of 3,000*l.*, and it is that part of the case that is supposed to bear upon the present. The arbitrator awarded that 260*l.* 12*s.* 6*d.* should be paid by the defendant to the plaintiff; but did not expressly state upon what account—whether on account of the verdict, or on account of the matters in difference. And this was the ground upon which the judgment of the court proceeded: Lord Denman saying—"I am at a loss to say, upon this award, whether the arbitrator meant that the 260*l.* 12*s.* 6*d.* should be substituted for the nominal verdict taken, or be paid in respect of matters in difference." And the award was set aside. Now, the doubt that existed in that case is here cleared up; for, the arbitrator has expressly awarded that the plaintiff is entitled to recover and have a verdict entered for him on the several issues joined in the cause,

and that the plaintiff hath sustained damages, by reason of the premises in the pleadings in the cause mentioned, and also of the several other matters in difference and dispute referred to him, to a certain amount; and he orders that 2,567*l.*, in addition to the 3,500*l.* deposited with him, be paid by the defendant to the plaintiff. It therefore appears clearly that the award is made as well in respect of the cause as of the matters in difference: consequently the objection is reduced to this, that the arbitrator has omitted to distinguish how much the plaintiff was entitled to in respect of the cause, and how much in respect of the matters in difference. The arbitrator has not, it is true, in so many words disposed of the verdict that was entered nominally for the plaintiff. But, after this award, there is no way in which the plaintiff could avail himself of that verdict. The form of the award may possibly present a difficulty in the way of the plaintiff obtaining his costs: but with that we have nothing to do.

2. When the terms of the submission are looked at, I think the second ground of objection fails. The arbitrator was to settle the cause and all matters in difference between the parties, and to order and determine what he should think fit to be done by them respecting the matters in dispute. One ground of complaint on the part of the plaintiff, was, that the defendant had not given security for the annuity according to the terms of the agreement. I think the arbitrator was warranted in including in the sum given by him as damages in respect of the matters in difference, the value of the annuity.

3. The third objection is, that the submission was revoked by the bankruptcy of the defendant which is alleged to have taken place. In the first place, it does not distinctly and satisfactorily appear that the defendant has become bankrupt: it is left as matter of inference. In the next place, as far as appears from the rule, this application is made on the part of *the defendant* only: and no authority

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has been cited to shew that a party may by committing an act of bankruptcy revoke a submission to arbitration. That which is said by Lord Tenterden in *Marsh v. Wood*, leaves the point quite undecided. At all events, it is not a matter that should be decided on motion.

ERSKINE, J.—1. For the reasons given by my Lord and my Brother Bosanquet, I concur in thinking that the case of *Mortin v. Burge* is distinguishable from the present. At the trial of this cause a verdict was taken by consent for 10,000*l.*, subject to the award of an arbitrator by whom the cause and all matters in difference between the parties were to be settled. The referee, in making his award, has given the plaintiff a large sum without specifically appropriating part to the action and part to the matters in difference: and it is therefore contended that the plaintiff is injured, because the verdict stands unqualified. If it had appeared that judgment could have been entered up for the plaintiff for the 10,000*l.*, so that the plaintiff might thereby obtain a better security for the amount adjudged to him than the mere award would give him, that might have given the defendant a right to complain. But that does not appear to me to be the consequence of that which the arbitrator has done. By the order of reference, execution was to issue only for 2,637*l.* in the event (which has not happened) of the 3,500*l.* not being deposited with the arbitrator on the day named. But the verdict would stand as a security only for such sum as the arbitrator might award as damages in the action. As, therefore, the arbitrator has not awarded anything specifically as damages in the action, the verdict stands wholly useless. And although the plaintiff might have reason to complain that he is deprived of the benefit of having a verdict standing as a security for the damages awarded in respect of the action, the defendant surely cannot complain, that, as to a portion of the sum awarded, the remedy against him is less efficient

than it might have been. It may be that the plaintiff will have a difficulty in recovering the costs of the action. But the plaintiff does not raise the objection: and I think it cannot be a valid one in the mouth either of the defendant or of his assignees.

2. The next objection is that the arbitrator has awarded to the plaintiff a gross sum as the value of the annuity, instead of giving (as it is suggested he should have done) the difference in value between an annuity secured upon real property and an annuity unsecured. It may be that the personal security of the defendant was worth nothing, and then the difference would be the entire value. Besides, if the arbitrator had only given the difference in value in the manner contended for on the part of the defendant, the plaintiff could not afterwards have recovered any further damages for nonpayment of the annuity. It seems to me that the proper mode of measuring the damages was, to calculate the value of the annuity, and make the defendant pay in money that which he was unable to secure on real property in pursuance of his agreement.

3. I agree with the rest of the court that *the fact* of the defendant's bankruptcy is not satisfactorily made out upon the face of the affidavits: and, if it had been, I should still have thought it no sufficient ground for setting aside the award. Bankruptcy of either party cannot operate a revocation of the submission when neither had power to revoke. If the assignees had been chosen whilst the reference was proceeding, it would have been right that they should have an opportunity to appear before the arbitrator. But here, at the time the bankruptcy is alleged to have taken place, the whole had been gone through with the exception of the mere ceremony of signing the award. I think the award was properly made. The dates would naturally excite a suspicion that the bankruptcy was got up for the mere purpose of attempting to defeat the award. That, however, is a matter we have nothing to do with.

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MAULE, J.—I am also of opinion that the rule to set aside this award must be discharged. 1. The first objection in substance is, that the arbitrator, having ordered the defendant to pay to the plaintiff a certain sum, has not proceeded to state for what sum the verdict is to be entered. The arbitrator might have directed a verdict to be entered for any sum not exceeding 10,000*l.*, including the 3,500*l.* which had been deposited with him. I do not agree, that, on payment of that sum to the arbitrator, there was an end of the plaintiff's right as far as the verdict was concerned. But, as the arbitrator has thought fit to award a gross sum for damages in the action and in respect of the matters in difference, without distinguishing how much was due in respect of each, the plaintiff cannot have the benefit of a verdict and judgment for any portion of it. This might be ground of complaint on the part of the plaintiff; but not on the part of the defendant.

2. I think, under this reference, the arbitrator had power to award a gross sum for the value of the annuity. The contract was that the defendant should grant to the plaintiff an annuity of a certain description. The plaintiff was entitled to be put in as good a situation as if an annuity had been granted of the quality contracted for; and this could only be accomplished by the course the arbitrator has adopted. That his power under the order was large enough, is abundantly clear: and I think he has exercised that power in a salutary and proper manner.

3. It is unnecessary on the present occasion to decide whether or not bankruptcy is a revocation of the submission to arbitration; though strong arguments against the affirmative of the proposition suggest themselves. I do not see why bankruptcy should operate a revocation when the party himself had no right to revoke. At all events, the bankruptcy of the defendant is no ground for setting aside the award, supposing it to have been satisfactorily shewn.

Rule discharged with costs.

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THIS was an action on a bill of exchange for 39*l.* 19*s.* 3*d.*, bearing date the 2nd February, 1838, and purporting to be drawn by the defendants upon and accepted by one Edward Hickman, payable three months after date to the order of the defendants, and by them indorsed to the plaintiff.

The defendant Badcock suffered judgment to go by default. The other defendant, Weston, pleaded—first, that he did not accept the bill—secondly, that he did not indorse it.

The cause was tried before Tindal, C. J., at the sittings in London after the last term. The facts that appeared in evidence were as follow:—The drawing and indorsement of the bill, in the name of Weston & Badcock, were in the handwriting of Badcock. Weston and Badcock had carried on business together down to the 29th December, 1837, when the partnership between them was by mutual agreement dissolved; but the dissolution was not advertised in the Gazette until the 20th March, 1838. The bill upon which the action was brought became due on the 5th May, 1838: and the action was commenced in July. The defence set up by Weston, was, that the bill was drawn, accepted, and negotiated with intent to defraud him; and it was insisted that the plaintiff was, at all events, bound to prove that the bill was indorsed to him by Badcock previously to the 20th March, when the notice of dissolution was first published.

His lordship left it to the jury to say, from all the circumstances, whether or not the bill was drawn at the time of its apparent date, and whether it was indorsed to the plaintiff before or after the 20th March. The jury returned a verdict for the plaintiff.

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A bill of exchange must, in the absence of evidence to raise a presumption to the contrary, be taken to have been drawn on the day on which it bears date.

A bill was drawn in the name of A. & B. on the 2nd February, payable at three months' date; and purported to be indorsed by A. & B., but it did not appear *when*: a dissolution of the partnership of A. & B. appeared in the Gazette on the 20th March: there was no direct evidence of partnership beyond the preceding December, nor did it appear that the indorsee had had any previous dealings with the firm:—Held, that the latter was not bound to prove affirmatively that the indorsement took place prior to the 20th March, but that the jury were at liberty to infer from the surrounding circumstances that it did.

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Barstow, in Hilary Term last, moved to enter a nonsuit, pursuant to leave reserved to him at the trial.—He submitted that the necessity of notice of the dissolution only arises where the partnership is apparent, or the parties have had dealings with the firm; and he cited *Kilgour v. Finlyson*, 1 H. Blac. 155, where it was held, that, on the dissolution of a partnership between A., B., and C., a power given to A. to receive all debts owing to and pay those owing from the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership, after the dissolution. [*Tindal*, C. J., referred to *Carter v. Whalley*, 1 B. & Ad. 11. There, S. and others carried on business under the name of “Plas Maddoc Colliery Company.” S. withdrew from the firm, which afterwards became indebted to C., no notice having been given to C. or the public of S.’s withdrawing. And it was held that S. was not liable for the debt, there being no sufficient evidence that he had ever, while a partner, represented himself as such to C., or appeared so publicly in that character that C. must have been presumed to know of it.]

A rule nisi having been granted—

Humfrey, on a former day in this term, shewed cause.—*Primâ facie*, a bill must be taken to be drawn on the day on which it bears date. This is a general rule applicable to all written instruments. Thus, in *Smith v. Battens*, 1 M. & Rob. 341, it was held that an indorsement on a promissory note admitting the receipt of interest, must be taken, in the absence of proof to the contrary, to have been written at the time at which it bears date. *Hunt v. Massey*, 5 B. & Ad. 902, 3 N. & M. 109, adopts the same principle. There, in an action by the drawer against the acceptor of a bill of exchange for 101*l.*, the defendant proved that he was under age when he accepted the bill. The plaintiff

then produced in evidence a letter in the defendant's handwriting, purporting by its date to have been written after he came of age, addressed to a third person, in these words—"I request you to pay H. (the plaintiff) 101*l.* at your earliest convenience after the date of this letter, from the money left me by my late grandfather, for which I have given my bill." This letter was proved to have been delivered to the plaintiff's clerk, but it did not appear when. It was held that the letter must, *primâ facie*, be taken to have been written and issued at the time when it bore date; and that, having been written after the defendant came of age, and before the bill became due, it would support a count upon a promise to pay according to the tenor and effect of the bill. And in *Goodtitle d. Baker v. Milburn*, 2 M. & Welsby, 853, in ejectment by a mortgagee against the assignee (under the Lords' act) of the mortgagor, it was held that a letter from the mortgagor to the mortgagee, dated previously to the assignment, was evidence against the defendant, and would be presumed to have been written at the time of its date, until the contrary was shewn. So, in *Sinclair v. Baggaley*, 4 M. & Welsby, 312, a written paper containing a statement of mutual accounts between a creditor and a bankrupt by whom it was signed, and bearing date previous to the bankruptcy, shewing a balance due to the creditor, was held to be *primâ facie* evidence, as against the assignees, in an action brought by them against the creditor, that it was written at the time it bore date. [*Erskine, J.*—In *Taylor v. Kinlock*, 1 Starkie, 175, it was ruled by Lord Ellenborough, that the date upon a promissory note made by a bankrupt, is *primâ facie* evidence to shew that the note existed before the act of bankruptcy was committed, so as to establish a petitioning-creditor's debt in an action by the assignees (145).] In *Dick-*

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(145) In *Wright v. Lainson*, 2 M. & Welsby, 743, Parke, B., says: "In a note in 2 Stark. Evid. 105, it is said that *Taylor v. Kinlock* proceeded upon a mistaken report of a case on the Northern

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son v. Smith, 7 T. R. 57, it is true, it was held, that, to an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant cannot set off cash notes issued by the bankrupt, payable to the bearer, bearing date before his bankruptcy, unless he shews further that such notes came to his hands before the bankruptcy: but that case proceeded on the words of the bankrupt act 5 Geo. 2, c. 30, s. 28 (146). On the same principle, it was held, in *Wright v. Lainson*, 2 M. & Welsby, 739, that an I O U bearing *date* before the bankruptcy of a trader, constitutes no evidence of a petitioning-creditor's debt, without some proof that it was in existence before the bankruptcy.—Upon what principle can the holder of a bill of exchange be called upon, in the absence of any evidence to impeach his title, to prove when it was indorsed to him? Surely the burthen of proof must lie on the other party. [*Maule, J.*—The plaintiff here alleges an indorsement by Weston and Badcock: must he not prove that Badcock, who indorsed, had authority to indorse in the name of the two?] The doctrine of *Parke, J.*, in *Heath v. Sansom*, 2 B. & Ad. 296, that the holder of a bill is *prima facie* entitled to recover on it, without proof of consideration given by himself or a prior indorsee, in the absence of evidence to impeach his title, is now very properly assented to by the rest of the judges. It is but

circuit. It is difficult to find any principle on which the mere date is evidence."

(146) Lord Kenyon there says: "The whole of the present case is resolvable into this question, on whom did the onus probandi lie? That being settled, every thing else follows of course. Now, the cases of set-off are understood to be in the nature of cross actions; and, if the defendant, instead of setting off

these notes, had brought his cross action against the assignees, he must have proved every thing necessary to constitute his demand; and the time when the notes were indorsed would be one material ingredient in that case; then, under this set-off, he must prove the same things."

And see *Wood v. Braddick*, 1 Taunt. 104.

reasonable that the party who impeaches his title should shew some ground for it.

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Barstow, in support of his rule.—Assuming that the date of a bill is *prima facie* to be taken to be the time when it is drawn—a doctrine the court will be slow to extend—still the plaintiff here is not entitled to recover without some evidence to shew that the bill was indorsed to him before the 20th March. In *Sinclair v. Baggeley*, the plaintiffs represented the bankrupt, and were adopting his act: therefore that case is inapplicable. As a general principle, the party who seeks to give effect to an instrument, is bound to sustain it. There was no evidence here to carry the partnership between Weston and Badcock lower down than December, 1837. The plaintiff was bound to shew an authority in Badcock to bind the two by a drawing and an indorsement on the 2nd February, 1838.

Cur. adv. vult.

BOSANQUET, J., now delivered the judgment of the court:—The case of *Anderson v. Weston* was argued before my three learned Brothers and myself in the absence of my Lord Chief Justice. The action was brought against the defendants Weston and Badcock, as drawers and indorsers of a bill of exchange dated the 2nd February, 1839. Badcock suffered judgment to go by default. Weston pleaded—first, that he did not draw—secondly, that he did not indorse: and upon these pleas issue was joined. It appeared that Weston and Badcock had been in partnership; that they had agreed between themselves to dissolve that partnership upon the 29th December, 1837, but the dissolution was not advertised in the Gazette, or notified to the public, until the 20th March, 1838; so that, as far as the public were concerned, and as far as the holder of this bill was concerned, there was no notice of the dissolution

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of the partnership until the 20th March, 1838, that is, more than six weeks after the date of the bill. The bill was proved to have been written, signed, and indorsed in the handwriting of Badcock, who had suffered judgment by default; and the question was, whether there was sufficient evidence to affect Weston with being the drawer and indorser of this bill, Badcock having, as far as the public were concerned, authority to draw and indorse bills in the name of the firm as long as the public were unapprised of the dissolution of the partnership which he had been carrying on in conjunction with the other defendant. The bill being proved to be in Badcock's handwriting, and dated on the 2nd of February, 1838, the question was, whether that was not *prima facie* evidence of its having been drawn at the time it bore date. It was insisted, on the part of the defendant Weston, that it was incumbent on the plaintiff to give some evidence to shew that the bill was drawn at the time it purported to bear date, or at least before the time when the dissolution of the partnership was made public. The question is, what is the general rule of law on the subject, where an instrument is proved to be in the handwriting of a party, and to bear a certain date—whether that is evidence as to the time of making the instrument. That it is not conclusive evidence is perfectly clear; the question is, whether it is not *prima facie* evidence. Before I advert to any of the authorities on the subject, it may be material to consider what has been the constant course at *Nisi Prius* when instruments are produced in support of an issue which is to be tried between the parties. When the deed is produced, and the execution of that deed is proved by the subscribing witness, or by accounting for the absence of the subscribing witness by death or otherwise, and proving the signature, and that deed bears a date, as far as my experience goes, that date has uniformly been taken to be *prima facie* evidence that the deed was executed at the time when it purports to

bear date. It is usual in cross-examination to inquire whether the deed was executed at the time it bears date; but I never heard it contended that it was incumbent on the party producing the instrument, not only to give evidence of its execution, but in the first instance, and before any evidence is offered to impeach or render doubtful the time of making the instrument, to shew that it was executed at the time it bears date. This is the case, not merely with respect to instruments binding on the person of the party in the cause, but also with respect to his title where the conveyance comes from third parties. But there is another case which may be put on the subject, which is a very strong one, to shew that the general rule is so. It is well known that an instrument thirty years old proves itself, provided it be produced from the proper custody. But, what is the meaning of a deed being thirty years old? The party who produces the deed is not called on to prove that it has been in existence for that period; but, if it bears date thirty years before the time of its production, the course is, unless the time of its execution is impeached, to receive the instrument as evidence.

There is, however, one exception to which several cases apply, which it is not necessary to go through in detail; that is, where a bill or note is produced for the purpose of proving a petitioning-creditor's debt to support a fiat in bankruptcy. In that case, though there may be some variance in the decisions on the subject, I apprehend it may be taken to be now settled, that some evidence beyond the mere date is necessary to shew that the instrument produced for that purpose had its existence before the act of bankruptcy took place. But the ground for requiring that proof appears to be a very reasonable and substantial one. A proceeding in bankruptcy differs from an ordinary suit. The effect of a fiat in bankruptcy is retrospective; it invalidates all transactions that take place

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subsequently to the act of bankruptcy; and therefore it may well be deemed insufficient in such cases merely to produce the instrument without giving also the auxiliary proof.

On the other hand, there are several cases which appear to recognize the general rule. I will first advert to that which has been established by a variety of decisions, as having been the rule of law prior to the late statute 9 Geo. 4, c. 14, s. 3. I mean the admission of the indorsement, in the hand-writing of the holder of a bill or note, of the receipt of interest, or of a part payment on account of the principal, with a date annexed to such indorsement, for the purpose of shewing that there has been an acknowledgment of the transaction to prevent the operation of the statute of limitations. That was established as a rule by certain cases in the House of Lords; and the question arose before my Brother Taunton in *Smith v. Battens*, 1 M. & Rob. 341, where the indorsement was prior to the statute 9 Geo. 4, c. 14. There had been a question with respect to the propriety of the reception of such indorsements, considering by whom they were made—by the party himself, and for his own benefit. That question has now been put an end to by the statute. But the case of *Smith v. Battens*, as far as it goes, appears to me to recognize this principle, that, if the indorsement be itself receivable, and not objectionable on account of the person who made it, then the date expressed is taken to be the time when the money was received. The circumstances of the case were these:—The note, when produced, had several indorsements upon it, purporting to be receipts for payment of interest: they were unsigned; and the last bore date before the 1st February, 1829, and within six years before the commencement of the action. A witness was called, who proved, that, in January, 1831, Elizabeth Hill placed the note in his hands, then having these indorsements upon it. It was objected for the defendant, that it should be shewn in whose hand-writing the in-

indorsements were made, and also that they were made before the 1st January, 1829, inasmuch as by the statute of 9 Geo. 4, c. 14, s. 3, such indorsements made after that day could not be received in evidence for the purpose of taking the case out of the statute of limitations, if they were made by or on behalf of the plaintiffs. My Brother Taunton, in stating his opinion, says: "I entertain some doubt as to the first point: but, upon the whole, I think that the delivery by Mrs. Hill of the note with the indorsements then upon it, is evidence that they were made by her authority; if so, it is the same thing as if those indorsements had been written by her own hand. As to the *time*, I have no doubt; if the indorsements were not written at the time they purport to bear date, it lies on the defendant to prove it: in the absence of all evidence to the contrary, I shall assume that they were written at the time they bear date." That case, therefore, clearly recognizes the general principle, provided the indorsement itself had been receivable.

There is another case of *Hunt v. Massey*, 5 B. & Ad. 902, 3 N. & M. 109. That was the case of an action brought on a bill of exchange for 101*l*. The defendant pleaded infancy, and proved, that, at the time he accepted the bill, he was under age. A letter was then produced written by him, which bore date subsequently to the time of his coming of age, and in which he requested a friend to pay the plaintiff 101*l*. It was objected that the defence being infancy, and there being no other proof of the defendant's having acknowledged the acceptance but this letter, bearing date subsequently to his majority, the letter might have been written by him at the time he gave the acceptance, for the purpose of satisfying the tradesman on the subject: and therefore some proof ought to have been given to shew that the letter was written subsequently to his majority. The court, however, held that the letter must be taken to have been written at the time it bore date.

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There is then another case which appears to me to be a strong one, which was decided recently in the court of Exchequer—*Sinclair v. Baggaley*, 4 M. & W. 312. That was an action brought by assignees of a bankrupt against a person indebted to the bankrupt: the defendant produced an account drawn up by the bankrupt; and in the result of that account, taking the dates to be true, the balance was in favour of the defendant. It was objected that the assignees were not to be bound by an act of the bankrupt which might have taken place after the act of bankruptcy, and therefore some proof ought to have been given to shew that that account was drawn up before the act of bankruptcy. However, the dates in the account purporting to be before the act of bankruptcy, the court held, that, unless there was something to impeach those dates, they must be taken to be *prima facie* true, and therefore that the defendant was entitled to judgment. This case also recognizes the general rule; and, on these grounds, my learned Brothers and myself are of opinion that, unless the date of the instrument be impeached by evidence, it must be considered the true date.

So far as to the date of this bill of exchange. The next objection is one on which it is not necessary to say much. It is, that there was no proof as to the time when the indorsement was made; that the indorsement might have been made after the time when the dissolution of partnership was notified to the public; and that, if this were to be treated as a point of law merely, as to the *prima facie* effect of the indorsement, it would not stand on the same footing as that of the date of the instrument, because the indorsement bears no date: but the Lord Chief Justice did not so consider it; he left the circumstances of the case to the jury, telling them that it was for them to say whether or not the indorsement was made before or after notice of the dissolution of partnership.

The circumstances of the case were, that the agreement for the dissolution of the partnership was executed on the 29th December, that the notification of it to the public was not made till the 20th March following, and that the bill was made payable to the drawers' own order. The question left to the jury was this, whether it was not sufficient to satisfy them that the bill had been issued shortly after the time it bore date, that the drawers of the bill themselves were the payees of it and the indorsers. For what purpose, it was asked, could a mercantile house draw a bill payable to themselves, and indorse it, unless for the purpose of either paying it away immediately, or very shortly after, or of making use of the bill in some way or other?

But that is not the question here. This is a motion to enter a nonsuit; and the question is, whether there was *any* evidence to go to the jury that the indorsement was made prior to the time when the notice of the dissolution of partnership appeared. For the reasons given, we think there was, and therefore this rule must be discharged.

Rule discharged.

THE POULTERS' COMPANY v. PHILLIPS.

THE declaration stated that their majesties King William and Queen Mary, by letters patent of the fourth year of their reign—after reciting that the late company of poulters, London, was an antient company, and had enjoyed divers privileges and immunities by virtue of several

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might call into the livery of the company any *freemen of the company* they should think fit, and a penalty of 10*l.* was imposed upon such as being so called refused, without sufficient reason, to be of the livery. Before a person can be admitted a liveryman of any of the companies he must be a *freeman of the city of London*. The Poulters' Company includes many who are not free of the city:—Held, that a condition, that the freemen of the company who are called to the livery must be such freemen only as are eligible by law, was necessarily to be implied from the subject-matter, and consequently that the bye-law was valid.

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charters and letters patent to them granted by their majesties' royal predecessors—did will, ordain, constitute, declare, grant, and confirm (amongst other things) that all and singular persons using the trade of mere poulters, or selling poultry wares, coneys, butter, and eggs, within the city of London and liberties thereof, or within seven miles of the said city, from time to time for ever thereafter, were and should, by virtue of those presents, be one body corporate and politic, in deed and name, of Masters, Wardens, and Assistants of Poulters, London: and, among other things, that there should be one of the company aforesaid, in manner and form thereafter in those presents mentioned to be chosen and named, who should be and be called the Master of the said company; and that likewise there should be from time to time for ever thereafter two of the said company, in manner and form thereafter in those presents mentioned to be chosen and named, who should be and be called the Wardens of the said company; and also that there should be, from time to time for ever thereafter, sixteen others of the company aforesaid, in manner and form thereafter expressed to be chosen and named, who should be and be called the Assistants of the said company, to be from time to time assisting and aiding to the master and wardens of the company for the time being, in all causes, matters, and business touching or concerning the said company; and that it should and might be lawful to and for the said master, wardens, and assistants of the said company for the time being, or the greater part of them (whereof the master and one of the wardens for the time being should always be two), as often as they should think it needful or expedient, to assemble themselves together at and in their Hall, or any other convenient place within the said city of London, and there from time to time, and at all convenient times thereafter, to ordain and make such reasonable laws, acts, orders, ordinances, and constitutions in writing, as to them, or the

greater part of them then and there assembled (whereof the master and one of the wardens aforesaid for the time being should be two), should seem fit and convenient, according to their best discretion, for or concerning the good estate, rule, order, and government of the said company, and of every member thereof; and in what order and manner the said master, wardens, and assistants, and all and every other person and persons, being free of the said company, within the limits aforesaid, should demean and behave themselves, as well in all and singular cases and things touching or concerning the said company, or anything thereunto appertaining, as also the master, wardens, and assistants in their several offices, mysteries, and functions touching or concerning the said company as aforesaid, and all and singular such pains, penalties, punishments, fines, and amerciaments, or any of them, against or upon any offender or offenders which should transgress, break, or violate the said constitutions, statutes, laws, ordinances, or orders so to be made, ordained, and established, or any of them, to impose, provide, and limit, and the same and every part and parcel thereof to ask, levy, take, and recover to and for the use of the said company, by way of distress, or by action of debt, or otherwise by any other lawful ways or means against the said offender or offenders, his, her, or their goods or chattels, or any of them, as the cause should require, and as to the master, wardens, and assistants of the said company, or the greater part or number of them (whereof the master and one of the wardens for the time being should be two), should deem most convenient or expedient: all which laws, orders, ordinances, and constitutions so to be made, ordained, and established as aforesaid, their said late majesties willed, and by those presents, for themselves, their heirs and successors, did command to be from time to time and at all times kept, obeyed, and performed in all things as the same ought to be, upon the pains, penalties, and punishments in the

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May 13, 1692.

same to be imposed, inflicted, and limited; so as the same laws, orders, articles, and ordinances, pains, penalties, fines, and amerciaments should be reasonable and not repugnant or contrary, but as near as might be agreeable to the laws or statutes of the said realm of England, and should be first confirmed and approved, according to the statute in that behalf made and provided. The declaration then, after averring acceptance of the letters patent, and that the said company was duly made and constituted a livery company of the said city of London, alleged, that on the 13th May, 1692, at an assembly or meeting of the then master, wardens, and assistants of the said company of poulters, London, held at a certain place called Innholders' Hall, the said master, wardens, and assistants of poulters, London, for the time then being, did constitute, order, and make a certain reasonable ordinance in writing, for, touching, and concerning the good estate, rule, order, and government of the said company, and of every member thereof, which said ordinance was not nor is repugnant or contrary, but was and is agreeable to the laws and statutes of this realm of England, viz. that the master, wardens, and assistants of the said company for the time being, or the more part of them, from time to time, and at all times thereafter, when and so often as they should think convenient and find it needful, should and might call, nominate, choose, and admit into the livery or clothing of the said company, such and so many person and persons, *being free-men of the said company*, as they should think meet, honest, and of ability to be called and admitted into the same livery; and that every such person so called and chosen should thereupon pay to the master, wardens, and assistants of the said company for the time being, to and for the use of the said company, for his admission into the livery of the said company, the sum of 20*l.* of lawful money of England, to be employed according to the custom and usage of the said city of London, and should also pay to

the clerk of the said company for the time being, for the entering and registering his name in the books of the said company, the sum of 5*s.*, and to the upper beadle of the said company for the time being the sum of 1*s.* 6*d.*, and to the under beadle 12*d.*; and that every person that should be so called, elected, and chosen into the livery, and should refuse or deny to be of the same livery, not having any lawful, just, or reasonable cause or let to excuse such his refusal or denial as by the master, wardens, and assistants of the said company for the time being, or the more part of them (whereof the master of the said company for the time being should be one), should be thought and adjudged sufficient, should for every time of such his refusal or denial forfeit and pay to the master, wardens, and assistants of the said company for the time being, to and for the use of the said company, the sum of 10*l.*, unless he should, before the master and wardens of the said company for the time being, or the more part of them (whereof the master of the said company for the time being should be one), in due form of law, take his corporal oath that he was not bonâ fide worth the sum of one hundred and fifty marks—as in and by the said ordinance, reference being thereto had, would, amongst other things, more fully appear: which said ordinance afterwards, to wit, on the 18th April, in the fifth year of the reign of our said late sovereign lord and lady William and Mary, at London aforesaid, amongst other ordinances and constitutions of the said company, was, according to the statute in that case made and provided, examined, approved of, and confirmed by the Right Honorable Sir John Somers, Knight, then Lord Keeper of the Great Seal of England, the Right Honorable Sir John Holt, Knight, then Lord Chief Justice of their said late Majesties' court of King's Bench, and the Right Honorable Sir George Treby, Knight, then Lord Chief Justice of their said late Majesties' court of Common Pleas: of all which said several

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premises the defendants had notice. The declaration then averred, that, on the 6th March, 1828, the defendant was duly admitted to the freedom of the said company, and then and there became and was, and thenceforth hitherto continually had been and still was a freeman of the said company; and the defendant afterwards, and before the call, nomination, and choice thereafter mentioned, to wit, on the day last aforesaid, became admitted to the freedom, *and became and was a freeman, of the city of London*, as a poulter, and so continued down to and at and after the time of the default of the said defendant thereafter mentioned; that, on the 29th March, 1838, the defendant was nominated into the livery of the said company, of which he had notice, and was required to attend at a court on the 28th June, 1838, to be admitted into the said livery; that, though he had no lawful excuse, he refused to attend the court to be so admitted into the said livery, and never took it upon himself; whereby an action had accrued to the master, wardens, and assistants of the poulters, to demand and have of and from the defendant the sum of 10*l*. Breach—non-payment.

To this declaration the defendant demurred generally; and the plaintiffs joined in demurrer.

Mellor, in support of the demurrer.—The several incorporated companies are connected with the city of London by their livery, in whom is vested the election of sheriffs, chamberlain, and other municipal officers, and also, until the passing of the reform act, 2 & 3 Will. 4, c. 45, the election of members to serve in parliament. To entitle a party to be of the livery of any company, it is necessary that he should be a freeman of the city (147), which he can

(147) And, to be free of the city, he must be a member of one of the companies—Innholders of London v. Gledhill, Sayer, 274. In Rex v.

Harrison, 3 Burr. 1322, 1 W. Blac. 372, a bye-law that a butcher in London *shall be free of the Butchers' Company*, was held good.

only be by service, by birth, or by redemption or allowance of the court of Mayor and Aldermen—*City of London's Case*, 8 Rep. 126 b. In *King v. Clerk*, 1 Salk. 349, Comyns, 24, 5 Mod. 319, Comb. 411, Holt, 430, it was resolved, that “the court of King’s Bench takes notice of a liveryman and the nature of his office.” Now, as the incorporation of the Poulterns’ Company embraces all persons from time to time using the trade of poulterns within the city of London and liberties thereof, or *within seven miles of the same city*, there must be many members of the company who are not free of the city, and consequently are not eligible to be liverymen. The bye-law in question is therefore bad, inasmuch as it professes to empower the master, wardens, and assistants of the company for the time being to nominate to the livery of the company *all* who are free of the company—a power that is inconsistent with the general law and custom of the city: Kidd on Corporations, 392. In *The Mayor &c. of Oxford v. Wildgoose*, 3 Lev. 298, the plaintiffs declared in debt “that the city of Oxford is an antient city, and a corporation by the name of mayor &c., and that time out of mind they have used to make bye-laws for the good government of the city and the citizens and burgesses, and to elect a chamberlain of the burgesses aforesaid yearly for a year, and that August 19, the first year of the present king, they made a bye-law, that, if any person *should be duly elected* to be chamberlain, and should refuse to undertake the said office, he should forfeit 10*l.* to the mayor &c., and then shewed that September 30, in the said first year, the defendant was according to the custom aforesaid duly elected into the said office, he being a citizen and freeman of the city aforesaid, and that he refused to accept it, whereby the action accrued for the said 10*l.* Upon which declaration the defendant demurred, and judgment was given for him by the whole court; for, the bye-law to elect aliquam personam is void, for thereby they might

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elect any stranger to be their chamberlain, and the words foret debite electus will not cure it, for that extends only to the manner of the election, but not to the persons to be elected; and, although 'tis said that they elected the defendant, being a citizen and freeman, that is only the execution of the bye-law, but will not make the bye-law good which is void in itself; for, it ought to have been, if any citizen or burgess shall be elected, and refuse, he shall forfeit 10*l.* to the mayor &c." This bye-law is in the nature of a penal act, and must be strictly construed. It is true, that, in *The Tobacco-pipe Makers' Company v. Woodroffe*, 7 B. & C. 838, 8 D. & R. 530, it was held that bye-laws for compelling, by means of pecuniary penalties, the attendance of members of a corporation at corporate meetings, and the acceptance of corporate offices, are reasonable, and may be enforced by action at law. But that case is distinguishable from the present; for, there, the bye-law in question had reference to the election of master, wardens, and assistants of the company, who must be chosen from amongst the livery; and therefore it applied strictly and exclusively to the members of the particular company; and the words used were more comprehensive than those found here. If this bye-law extends to every member of the company, whether free of the city or not, it is clearly repugnant to and an alteration of the constitution of the company as given by the charter, and therefore bad—*Rex v. Breton*, 4 Burr. 2260: and, if bad in part, it is void altogether—*Stationers' Company v. Salisbury*, Comb. 221. The reasons for upholding these companies are much weakened since the time of Lord Holt.

Barstow, contra.—The bye-law in question is to be dealt with according to the ordinary rules of construction: and he who becomes a member of a company impliedly acquiesces in the bye-laws by which it is regulated—*Tavern-*

er's Case, Sir T. Raym. 446. The only reasonable construction that can be given to this bye-law, is, to hold it to apply only to such members of the company as are freemen of the city, seeing that none others are eligible to the livery : and the declaration avers (perhaps unnecessarily) that the defendant was a freeman of the city. The case is not to be distinguished from that of *The Tobacco-pipe Makers' Company v. Woodroffe*. Abbott, C. J., delivering the judgment of the court, there says : "The objects of the fifth and tenth bye-laws respectively set out in the case, are, first, to compel the due attendance of members of the corporation at corporate meetings, and, second, to compel the acceptance of corporate offices ; and, with these objects in view, we think no exception can be taken to these bye-laws, inasmuch as attendance at corporate assemblies and the acceptance of corporate offices are duties that every member owes to the corporation to which he belongs. There appears to us to be no objection to the manner in which these bye-laws are worded. The fifth appears to be free from all objection. It requires the attendance of the master, wardens, and assistants, at corporate meetings, at the peril of paying the fines therein mentioned. The tenth is more general. It is by that ordained, 'that, if *any person* who shall be chosen to be a warden of the said company shall refuse to undergo or accept the said office of warden, or to take the oath appointed to be administered unto him in that behalf, every person so refusing to undergo or accept the same office of warden, or to take the oath aforesaid, shall forfeit and pay to the said company, for the use thereof, the sum of 6*l.* 13*s.* 4*d.*' It was urged, in the argument for the defendant, that the word 'person' as used here, will include persons who are not liable to serve the office of warden, and consequently that this bye-law is void ; and for this *The Mayor &c. of Oxford v. Wildgoose*, 3 Lev. 293, was cited. That case, however, is not a sufficient authority on the present occasion. There the objection

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does not appear to have been much discussed or considered, and we think it cannot be supported. In that case as well as this, we think the condition of liability to serve the office, from the subject-matter and necessary implication arising from the use of the word 'person' where it is found, must be considered as confined to such persons as are members of the corporation." That case clearly over-rules *The Mayor of Oxford v. Wildgoose*.

Mellor, in reply.—The court cannot, without doing violence to the language of the bye-law in question, construe it otherwise than as applying to *every* member of the company. The case of *The Tobacco-pipe Makers' Company v. Woodroffe* is clearly distinguishable on the ground already suggested.

Cur. adv. vult.

TINDAL, C. J., delivered the judgment of the court:—The question in this case arises on the validity of a bye-law made by the master, wardens, and assistants of poulterers, London, bearing date the 13th May, 1692, by which it was ordered and established that the master, wardens, and assistants for the time being, or the more part of them, might call, nominate, choose, and admit into the livery or clothing of the said company, such or so many person or persons, being freemen of the said company, as they should think meet, honest, and of ability to be called and admitted into the same livery; and imposing a penalty of 10*l.* upon every person so called, elected, and chosen, who should refuse or deny to be of the same livery, not having such lawful, just, or reasonable cause for such refusal or denial, as by the master, wardens, and assistants of the company should be thought sufficient. And the objection taken to the legality of this bye-law, upon a general demurrer to the declaration, is this, that it impowers the company to call into the livery or clothing of

the company members of the company not being freemen of the city of London; whereas by law such persons only as are freemen of the city of London, as well as freemen of the company, are qualified to be called into the livery or clothing of the company.

It was agreed by both the learned counsel who argued the case, that, before a person can be admitted a liveryman of any of the companies, he must be a freeman of the city of London: and, as the incorporation of this company extends to and includes all persons from time to time using the trade of poulters within the city of London and liberties thereof, or within seven miles of the same city, it follows that there may be many of the freemen of the company who are not freemen of the city of London. If, therefore, this bye-law is to be construed strictly by the letter, and to be held to give the master, wardens, and assistants the power of calling into the livery of the company *all* such persons, being freemen of the company, as they should think fit, it would extend to such persons who by the law and custom of the city could not be of the livery of the company, by reason of their not being free of the city; and consequently such bye-law must be held to be void, upon the authority of the opinions of Foster, J., and Wilmot, J., on this same precise point, taken in the *Innholders of London Company v. Gledhill, Sayer, 274.*

But we think the words of the bye-law must receive a reasonable construction, and that a condition that the freemen of the company who are called to the livery must be such freemen only as are eligible by law, is necessarily to be implied from the subject-matter of the bye-law. Such was the decision of the court of King's Bench in the case of *The Tobacco-pipe Makers' Company v. Woodroffe*, 7 B. & C. 838, 8 D. & R. 530, in which the former case of *The Mayor of Oxford v. Wildgoose*, 3 Lev. 293, is in express terms over-ruled. And we cannot distinguish the present case

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Bye-law to receive a reasonable construction.

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upon principle from that of *The Tobacco-pipe Makers' Company v. Woodroffe* above referred to.

We therefore think the bye-law stated in the declaration is good, and that there must be—

Judgment for the plaintiffs.

Saturday,
Jan. 31st.

MURDOCK v. TAYLOR.

The defendant being sued for arrears of rent, and one Blatch, who claimed to be entitled as mortgagee of the premises, having given him notice not to pay the rent to the plaintiff—

The defendant being sued for arrears of rent, and having received notice from one claiming to be entitled as mortgagee of the premises not to pay the rent to the plaintiff, obtained a rule under the 1st section of the interpleader act. The claimant not appearing to maintain his claim, the court ordered that the claim should be barred, and that the plaintiff and defendant respectively should each bear his own costs of the rule—the proceedings in the action being stayed on payment by the defendant of the rent and costs.

THE defendant being sued in debt for arrears of rent, and one Blatch, who claimed to be entitled as mortgagee of the premises, having given him notice not to pay the rent to the plaintiff—

M'Mahon, on a former day in this term, obtained a rule nisi under the interpleader act, 1 & 2 Will. 4, c. 58, s. 1; the rule prayed that the defendant might have his costs out of the fund, on the authority of *Pitches v. Edney*, 6 Scott, 582, 4 New Cases, 724.

Talfourd, Serjeant, for the plaintiff, prayed that the claim of Blatch (who did not appear to maintain it) might be barred. With respect to the costs, he submitted that the defendant, who had improperly yielded to an unfounded claim against his own landlord, was not in a situation to ask them against him, whatever his right might be as against the claimant, Blatch. [*Tindal*, C. J.—All we have authority to do as against the claimant who declines to appear, is, to bar him: we cannot call on him to pay costs.] The plaintiff is brought here unnecessarily by the defendant: he ought to be indemnified from costs.

M'Mahon, contra.—The defendant is entitled to have his costs out of the fund provided it be sufficient: if not,

from the plaintiff, leaving the latter to his remedy against the claimant. In equity the stakeholder was always indemnified—*Aldrich v. Thompson*, 2 Bro. C. C. 149: and the same principle has been acted upon at law—*Ducar v. Mackintosh*, 3 M. & Scott, 174, 2 Dowl. 734; *Cotter v. The Bank of England*, 3 M. & Scott, 180, 2 Dowl. 728; *Parker v. Linnett*, 2 Dowl. 562; *Agar v. Blethyn*, 1 Tyr. & Gr. 160; *Reeves v. Barraud*, 7 Scott, 281. [*Maule, J.*—In all these cases the parties claiming appeared to interplead.] The rights of the stakeholder are not to be affected by the non-appearance of the claimant. The court may at all events deal with the fund. In *Bowdler v. Smith*, 1 Dowl. 417, *Perkins v. Burton*, 2 Dowl. 108, 3 Tyr. 51, and *Shuttleworth v. Clark*, 4 Dowl. 561, the claimants did not appear, and yet they were charged with costs. In *Perkins v. Burton*, the rule was that the claimant should pay the costs unless within four days he shewed good cause to the contrary—costs not having been prayed as against him in the first instance. The same course may be adopted here. [*Maule, J.*—The cases last cited were of applications under the 6th section—on behalf of the sheriff—which gives the court larger powers as to costs than the 1st and 3rd sections do (148)]. In *Pitches v. Edney*, 4 New Cases, 724,

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(148) See *Lambert v. Cooper*, 5 Dowl. 547. That was the case of an application under the 1st section. The claimant did not appear, and the applicant prayed for costs out of the fund. But, per *Williams, J.*—“Why is the fund in dispute to be diminished? what harm has the original vendor of these goods done? If there is any delinquent, it is the person who has put forth an idle claim; but he is not before the court, and it may be doubtful if the court can award costs against him. If he were here, I would undoubtedly, if I had power, allow

the costs against him. There can, consequently, be no costs allowed to the applicant out of the fund in dispute. If a fresh application is made to the court, to order the person who made the claim to pay the costs of this rule, as to the power to do which I give no opinion, that question may then be discussed. The rule must be, that the claimant be barred of his claim, and that the action be stayed on payment of the debt and the costs of the action; each party paying his own costs on this rule.”

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Coltman, J., says: "I wish not to lay down any general rule that the stakeholder is at all events entitled out of the fund, when the third party does not appear: but the court is authorized to do what is just and reasonable; and, where the plaintiff has a remedy over against the wrongdoer, the stakeholder should be indemnified out of the fund."

BOSANQUET, J. (149)—The court has no authority save that which is created by the act of parliament. The general discretion given to us by the 1st section, to make such rules and orders as to costs and all other matters as may appear to be just and reasonable, relates only to the case of a claimant or third party appearing to maintain his claim. The third section (150) provides for the case of the third party *not* appearing. The court may in that case declare his claim for ever barred: but they have no authority to make any order as to costs except as between the plaintiff and defendant; they cannot order the claimant to pay costs (151). Then it is said the costs should be charged upon the fund. The defendant admits that the rent was

(149) Tindal, C. J., was attending a Privy Council.

(150) Section 3 enacts, "that, if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving, nevertheless, the right or claim of such third party against the plaintiff; and

thereupon to make such order between such defendant and the plaintiff as to costs and other matters as may appear just and reasonable."

(151) In *Philby v. Ikey*, 2 Dowl. 222, it was held, that, where a claim is made by one on behalf of another to goods seized by the sheriff in execution, and, upon a rule being obtained under the interpleader act, neither party appears to shew cause, the plaintiff is not entitled to receive his costs from the sheriff, but the sheriff and plaintiff are both entitled to their costs from the claimant or his agent, upon a rule to shew cause.

owing; but he came to the court to protect himself from the consequences of an unfounded claim by a third party, who does not come here to enforce it. I see no reason why the plaintiff should be called upon to pay the costs. I do not think either party is entitled to costs.

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ERSKINE, J.—I am of the same opinion. The power of the court over the costs is limited and defined by the statute: and that, by s. 3, only authorizes them to make orders touching costs as between the plaintiff and the defendant in a case where the claimant or third party omits to appear to maintain his claim. On the part of the defendant it is contended that his costs should be paid out of the fund, and that the landlord should be left to his remedy against the claimant. But, what redress would that be giving him? and why should such a burthen be thrown upon him, merely because the defendant has thought fit to come to the court for his own protection against a claim that turns out to be unfounded? I think the defendant ought to pay the costs.

MAULE, J.—The third section of the interpleader act limits the discretion of the court as to the costs in cases where the claimant or third party does not appear to support his claim, to costs as between the plaintiff and defendant. And there may have been good reason for so limiting it; for, if a claimant who omitted to appear to enforce his right were compelled to pay costs, the parties would in all cases appear, to the great increase of the costs of all. By the 6th section, which relates to applications on the part of the sheriff, the court has a general discretion as to the costs of *all* the proceedings. One can very well understand why a distinction should be made between the case of a party vexatiously interfering with the sheriff in the execution of a public duty, and that of a mere claim against a private individual. The intention,

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however, of the legislature is clearly expressed; and I see nothing unreasonable in giving full effect to the act. The suggestion that the costs should be paid out of the fund, is most unreasonable. The plaintiff has been guilty of no default.

Rule absolute—that the claimant, Blatch, be barred as against the defendant, that each party pay his own costs of the rule, and that the proceedings be stayed on payment by the defendant of the debt and costs in the action.

END OF HILARY TERM.

IN THE EXCHEQUER CHAMBER.

HILARY VACATION, 3 VICTORIÆ.

THE JUDGES PRESENT WERE—LORD ABINGER, C. B., LITTTLEDALE, J.,
PARKE, B., PATTESON, J., WILLIAMS, J., GURNEY, B.,
COLERIDGE, J., AND ROLFE, B.

THE GAS LIGHT AND COKE COMPANY v. TURNER.

[Error from the Court of Common Pleas.]

THE first count of the declaration stated, that, on the 13th August, 1833, by a certain indenture sealed with the common seal of the plaintiffs, and then made between the plaintiffs of the one part, and the defendant and one William Shackell and Benjamin Hopkinson of the other part—profert of the counter part—the plaintiffs demised, leased, set, and to farm let unto the defendant and the said W. Shackell and B. Hopkinson, their executors, administrators, and assigns, certain tenements and premises, with the appurtenances, particularly mentioned and described in the said indenture—habendum for twenty-one years, at the yearly rent of 300*l*. The count then set out a covenant on the part of the defendant, his heirs, executors, and administrators, for payment of the rent,

indenture was made between the plaintiffs and himself, and the premises demised by them to him, *for the express purpose* of being used for and applied by the defendant to a use prohibited under a penalty by the building act, 25 Geo. 3, c. 77:—Held, that the plea was a good answer to the action.

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Feb. 12th.

A court of law will not lend its aid to enforce the performance of a contract between parties, which appears, upon the face of the record, to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land.

In covenant for non-payment of rent, the defendant pleaded that the

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and a proviso for determining the term at the end of the first seven or fourteen years; and averred, that, by virtue of that demise, the defendant and the said William Shackell and B. Hopkinson entered into and upon the demised premises, and became and were possessed thereof for the said term so to them thereof granted, which said term was still subsisting and undetermined: Performance by plaintiffs: Breach—that, after the making of the said indenture, and during the term thereby granted, and during the first seven years of the said term, to wit, on the 13th February, 1838, a large sum of money, to wit, 75*l.* of the rent aforesaid, for one quarter of a year of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due and still was in arrear and unpaid to the plaintiffs, contrary to the tenor and effect, true intent, and meaning of the said indenture, and of the said covenant of the defendant so by him in that behalf made as aforesaid.

Second count.

The second count stated, that, on the said 13th August, 1833, by a certain agreement indented and then made between the plaintiffs of the one part and the defendant and the said W. Shackell and B. Hopkinson of the other part—profert—after reciting, that, by an indenture bearing even date with the said agreement, and made between the plaintiffs of the one part, and the defendant, the said W. Shackell, and the said B. Hopkinson of the other part (being the said indenture in the first count thereinbefore mentioned), the plaintiffs had demised unto the defendant and the said W. Shackell and B. Hopkinson, their executors, administrators, and assigns, the tenements and premises, with the appurtenances, thereinbefore referred to, for the said term of twenty-one years, determinable as thereinbefore mentioned, commencing from the day of the date thereof, at and under the yearly rent of 300*l.*, and subject to the covenants and agreements in the said indenture reserved and contained; and that *it had been*

agreed by and between the plaintiffs and the defendant and the said W. Shackell and B. Hopkinson, that they, the defendant, and the said W. Shackell, and B. Hopkinson should enter into the covenants and agreements thereafter contained; the defendant did thereby, for himself, his heirs, executors, and administrators, covenant and agree with and to the plaintiffs, their successors and assigns, amongst other things, as follows, that is to say—That the defendant and the said W. Shackell and B. Hopkinson, or some or one of them, their or some or one of their executors, administrators, or assigns, would purchase and take of and from the plaintiffs at least 100,000 gallons of tar yearly and every year *during the said term of twenty-one years, determinable as aforesaid*, and pay the plaintiffs or their successors for the same at and after the rate of 1*d.* per gallon, and that such tar should be received and taken by the defendant and the said W. Shackell and B. Hopkinson, their executors, administrators, or assigns, at some or one of the stations or works of the plaintiffs, in such quantities and proportions as might be fairly and reasonably required, and that, previous to requiring a delivery of any tar, the defendant and the said W. Shackell and B. Hopkinson, their executors, administrators, or assigns, should give a certain notice. Averment, that the term of twenty-one years in the agreement mentioned was still subsisting and undetermined of and in the tenements and premises, with the appurtenances, therein mentioned and referred to—Performance by plaintiffs—Breach, that, although the plaintiffs, after the making of the agreement, and during the first year of the said term of twenty-one years in the said agreement mentioned, were ready and willing to sell to the defendant and the said W. Shackell and B. Hopkinson the full quantity of 100,000 gallons of tar, at the rate in the said agreement in that behalf mentioned, and to deliver the same to the defendant and the said W. Shackell and B. Hopkinson at some or one of the stations

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Covenant that the defendant would purchase of the plaintiffs 100,000 gallons of tar yearly.

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or works of the plaintiffs in the said agreement referred to, in such quantities and proportions as might be fairly and reasonably required, pursuant to the said agreement in that behalf, whereof the defendant and the said W. Shackell and B. Hopkinson during all that time had notice; and, although they the plaintiffs oftentimes during the said first year of the said term of twenty-one years requested the defendant and the said W. Shackell and B. Hopkinson to purchase, accept, and receive such full quantity of 100,000 gallons of tar, according to their said covenant in that behalf, &c.: yet the defendant and the said W. Shackell and B. Hopkinson did not nor would, nor did nor would any or either of them, during the said first year of the said term of twenty-one years, purchase or take of or from the plaintiffs the said full quantity of 100,000 gallons of tar, or pay the plaintiffs for the same at the rate and in the manner in the said agreement in that behalf mentioned: but, on the contrary thereof, took of and from the plaintiffs 95,910 gallons, and refused to purchase or take or pay for the residue. [There was a second breach, alleging, that in the third year of the term, 97,120 gallons only were taken; and a third, that, in the fourth year, 50,758 gallons only were taken]: by means whereof the plaintiffs were put to expenses, and compelled to provide warehouse-room for the surplus.

Plea to the first
 count.

The defendant pleaded—First (to the first count), that the indenture in that count mentioned was made after the making and passing of a certain act of parliament made and passed in the 25 Geo. 3, [c. 77], intituled, &c., by which said statute, after reciting as therein is recited, it was, amongst other things, enacted, that, from and after the 1st August, 1785, it should not be lawful for any person or persons within that part of Great Britain called England, to distil or boil any turpentine or tar, or to draw any oil of turpentine and rosin by distilling turpentine, or

to draw any oil of tar or pitch by distilling or boiling tar, or to boil any oil and turpentine together, or to boil any oil and tar together, above the quantity of ten gallons at one time of all or any of the said commodities in any work-house or place contiguous to any other building, or in any place nearer to any other building than the distance of seventy-five feet at the least (except in houses and buildings then in use for carrying on such manufactories, and then legally entitled to be used for those purposes), *upon pain that every person offending therein should for every such offence forfeit and pay the sum of 100l.*; that the said tenements and premises, with the appurtenances, in the indenture in the said first count mentioned were not, before or at the time of the making and passing of the said act, in use for carrying on any such manufactories, and were not then legally entitled to be used for those purposes or any of them; that, at the time of the sealing and making of the said indenture in the said first count mentioned, and from thence continually hitherto, the said tenements and premises, with the appurtenances, were situate and being in that part of Great Britain called England, and were each and all of them workhouses and places contiguous to other buildings, and in places nearer to other buildings than the distance of seventy-five feet; that the said indenture was made and entered into by and between the plaintiffs and the defendant and the said W. Shackell and B. Hopkinson in manner and form as in the said first count of the declaration mentioned; and the said tenements and premises with the appurtenances in the first count mentioned, were demised to the defendant and the said W. Shackell and B. Hopkinson *for the express purpose of being used for and applied to the drawing oil of tar or pitch by distilling and boiling tar, and of boiling oil and tar together, by the defendant and the said W. Shackell and B. Hopkinson in larger quantities than the quantity of ten*

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 Plea to the second count.

gallons at one time of the said commodities respectively, contrary to the form of the said statute, whereby the said indenture was and is wholly void in law—verification.

To the second count, the defendant pleaded—that the agreement made and indented as in that count mentioned, was made and entered into by and between the plaintiffs and the defendant and the said William Shackell and B. Hopkinson, after the making and passing of the said act of parliament in the said first plea mentioned and in the introductory part of that plea recited; and that the tar and every part thereof in that agreement mentioned was to be supplied by the plaintiffs and sold to the defendant and the said W. Shackell and B. Hopkinson, *for the express purpose of being distilled and boiled in and upon the tenements and premises with the appurtenances in the first plea mentioned and by the indenture in the said first count mentioned demised to the defendant* and the said W. Shackell and B. Hopkinson, above the quantity of ten gallons at one time, contrary to the form of the said statute in the said first plea mentioned; by means whereof, and by force of the statute, the said agreement was and is wholly void in law—verification.

Demurrer to the first plea.

To these pleas the plaintiffs demurred specially; assenting for causes, as to the first—that it did not distinctly appear, nor was it alleged by the plea, that the plaintiffs, at the time of the making of the said indenture in the first count mentioned, were cognizant of the purpose for which the lessees intended to use the said demised premises, and that no collateral agreement or otherwise was alleged by the said plea to have been made by the plaintiffs and the said lessees that the said demised premises, or any part thereof, should be used for the purpose in the said plea mentioned—that there was nothing alleged in the said plea to shew that the said lessees were obliged to use the said demised premises, or any part thereof, for

the purpose mentioned in the said plea; and that, by virtue of the said lease, the said lessees were entitled to use the same premises for any purpose whatever—that an estate for twenty-one years passed to the said lessees, and had not been and could not be divested out of them by any purposes to which they may have chosen to devote the said demised premises—that the said act of parliament in the said plea mentioned, did not render the said lease invalid—and that it did not appear in and by the said indenture that the said premises were demised for the purpose in the said plea in that behalf mentioned.

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* As to the second plea, the causes of demurrer assigned were—that it was not alleged in or by that plea that the plaintiffs were cognizant of the purpose therein mentioned; that no such purpose appeared to have been expressed in or by the agreement in the last count mentioned; and that, if any collateral agreement to that effect existed, it ought to have been set forth with precision in the plea, in order that the court might judge how far the plaintiffs were implicated in the said alleged purpose—that the agreement in the last count mentioned was an executory agreement, and the lessees were bound to receive the quantities of tar therein mentioned and apply them to innocent and lawful purposes—that the lessees were not bound by the said agreement or otherwise to consume the said tar otherwise than in a lawful manner—that the lessees might, if they pleased, boil the said tar in quantities of less than ten gallons at one time, or might resell the said tar, and were not bound to violate the provisions of the said act—that the said last plea was argumentative and incomplete, in not precisely following the words of the said act, and in not precisely shewing the situation of the premises therein mentioned, or the structure or position thereof—and that it did not appear in and by the said agreement indented, that the said tar was to be sup-

Demurrer to
 the second plea.

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 Joinder.

plied by the plaintiffs, and sold as in the said plea mentioned, for the purpose in the said plea mentioned.

The defendant joined in demurrer.

The court of Common Pleas having pronounced judgment for the defendant on these demurrers—see 7 Scott, 779, 5 New Cases, 666—the plaintiffs brought a writ of error.

R. V. Richards, for the plaintiffs in error.—The lease in question discloses no illegality, and the defendant cannot import into the contract by parol an illegality that is not apparent upon the face of the deed itself. And if such illegal purpose did appear upon the face of the lease, or it was competent to the defendant to give parol evidence of it, non constat that such illegal purpose will be carried into effect; and there is no allegation in either of the pleas that any illegality has been committed. All the cases that are to be found in the books, are cases of executed contracts, where the illegality was in the contract itself, and the individual seeking to enforce it was not only cognizant of but party to the illegality: as in *Little v. Poole*, 9 B. & C. 192, where a vendor of coals who had delivered to the purchaser a ticket not signed by the meter pursuant to the statute 47 Geo. 3, sess. 2, c. 68, s. 113, was held to be disabled to sue for their price. So, in *Law v. Hodson*, 11 East, 300, where the seller of bricks below the statutable size was held to be without remedy for their value; and in *Bensley v. Bignold*, 5 B. & A. 335, where it was held that a printer could not recover for labour or materials used in printing a work to which he had omitted to affix his name pursuant to the 39 Geo. 3, c. 79, s. 27; Bayley, J., saying—"A party cannot be permitted in a court of law to recover for work and labour done in direct violation of the law." Again, in *Langton v. Hughes*, 1 M. & Sel. 593, where the sale to the defendants of drugs which

the plaintiffs knew were intended to be used in the defendants' brewery, in violation of the 42 Geo. 3, c. 38, s. 20, was held to be a contract on which the plaintiffs could not sue; and in *Cannan v. Bryce*, 3 B. & A. 179, where money lent with an express understanding that it was to be applied by the borrower in the payment of differences on illegal stock-jobbing transactions, was held not to be recoverable back by the lender. So, in *Holman v. Johnson*, Cowp. 341, and *Clugas v. Penahna*, 4 T. R. 466, the plaintiff was not allowed to recover the price of goods sold by him for the express purpose of their being smuggled into this country. In each of these cases, the contract which the plaintiff sought to enforce was a contract expressly made in breach of the respective statutes; but, here, the illegality forms no part of the agreement, and, for anything that appears, no illegality has ever yet been committed. The consumption of the tar on the premises formed no part of the contract. In *Bowry v. Bennett*, 1 Camp. 348, where in assumpsit for the value of wearing apparel, the defence set up was that the defendant was a prostitute, and that this was known to the plaintiff, and that the clothes in question were sold to the defendant for the purpose of enabling her to carry on her trade; Lord Ellenborough said, "it must not only be shewn that the plaintiff had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it. In that case the contract was corrupt and illegal, and such as could not be enforced in a court of justice; but it was not to be considered of this description from the mere circumstance of the defendant being a prostitute, even with the plaintiff's knowledge." And see *Crisp v. Churchill*, 1 B. & P. 340, and *Lloyd v. Johnson*, 1 B. & P. 341. In *Armstrong v. Lewis*, 4 M. & Scott, 1, 2 C. & M. 274, A. and B. carried on the business of a pawnbroker in partnership under a deed;

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the business was conducted solely by A., and his name only appeared over the shop door and upon the printed tickets and duplicates used by persons in that trade, and the license contained the name of A. only : and the court seem to have thought, that, although the parties might by this contract have rendered themselves liable to penalties imposed by the statute 39 & 40 Geo. 3, c. 99, yet that, there being no actual agreement for an infraction of the law, the contract was not void. At all events, the lease is valid; for, the plaintiffs could not avoid it by setting up an illegality to which they were themselves parties—*Doe d. Roberts v. Roberts*, 2 B. & A. 367; *Lord v. Wardle*, 3 N.C. 680, 4 Scott, 402. *Lightfoot v. Tenant*, 1 B. & P. 551, upon which the judgment of the court below mainly turned, arose upon the statute 7 Geo. 1, c. 21, by which the contract itself was declared void.

Petersdorff, for the defendant, was stopped by the court.

LORD ABINGER, C.B.—All the authorities shew, that, at common law, a contract that is entered into for the purpose of carrying into effect a thing that is prohibited, cannot be enforced : and it makes no difference that the contract is under seal. The lease in this case, having been granted, as is admitted by the demurrer, expressly with a view to the premises being used for an illegal purpose, is a void lease. I agree that a party cannot by parol add to or vary the terms of a contract under seal : but there is nothing objectionable in evidence shewing that the purpose for which the contract was entered into was an illegal one : that is not varying the terms of the contract. Here, the lease is part of the illegal contract : and the lease having been granted expressly for the purpose of enabling the lessees to do that which the law does not allow, it is no answer to say that the illegal purpose for which it was

granted has not been carried into effect. I am of opinion, therefore, that the judgment of the court below ought to be affirmed.

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LITTLEDALE, J.—I am of the same opinion. The pleas expressly state that the lease was granted for the purpose of enabling the defendant and Hopkinson to use the premises for drawing oil of tar or pitch by distilling and boiling tar, and for boiling oil and tar together in quantities prohibited, under a penalty, by the 25 Geo. 3, c. 77, to be done upon premises situate as the premises in question are situated: and this is admitted by the demurrer. It is true that the illegal purpose does not appear on the face of the lease; but I see no objection to the defendant being permitted to shew it by evidence aliunde. Nor does it, in my opinion, make any difference, in considering the sufficiency or insufficiency of the plea, that the illegal purpose does not appear to have been carried into effect. The *contract* is equally illegal, whether the object the parties had in view when they entered into it was effectuated or not. I concur with the Lord Chief Baron in thinking that the judgment of the court of Common Pleas must be affirmed.

PARKE, B.—I am also of opinion that the judgment of the court below ought to be affirmed, for the reasons already given. The argument that the lease is not so void that the plaintiffs could so treat it, and eject the lessees, does not properly arise here.

PATTESON, J.—This is probably going a little beyond any of the cases that are to be found in the books, but I think not improperly.

GURNEY, B., and COLERIDGE, J., intimated their concurrence.

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WILLIAMS, J., and ROLFE, B., had quitted the court before the conclusion of the argument.

Judgment affirmed (152).

(152) "I fully assent to the general proposition which has been urged, that an agreement to do an unlawful act cannot be supported in law." Per Lord Abinger, C. B., in *Lewis v. Davison*, 4 M. & Welsby, 654. "The quality of the agree-

ment, whether fraudulent or not, must depend upon the intention of the parties to it at the time of making it." Per Tindal, C. J., in *Lord Howden v. Simpson* (in error), 2 P. & D. 731.

IN THE COMMON PLEAS.

3 VICTORIÆ.

POGSON and Others v. THOMAS and Others.

Friday,
Jan. 17th.

THE following case was by order of the Master of the Rolls sent for the opinion of this court:—

Emily Pogson, late of Kesgrave House, in the county of Suffolk, widow, deceased, was in her lifetime and at the time of making her will hereinafter mentioned, and from thenceforth and at the time of her death, seised in fee-simple in possession of the lands and hereditaments hereinafter mentioned; and, being so seised, the said Emily Pogson did, when she was of sound and disposing mind, memory, and understanding, duly make and publish her last will and testament in writing, bearing date on or about the 10th July, 1835, and which was executed and attested by her so as to pass freehold estates of inheritance; whereby she gave and bequeathed unto and to the use of George

The testatrix, being seised of a mansion called Kesgrave House, with lands adjoining situate in the several parishes of Kesgrave, Little Bealings, and Playford, in the county of Suffolk, by her will, wherein she described herself as of "Kesgrave House, in the county of Suffolk," devised to trustees "all and singular her freehold messuage or tenement, lands and heredita-

ments, situate at Kesgrave aforesaid (and two sets of chambers in Gray's Inn), with the appurtenances thereto respectively belonging," upon certain trusts: and, after giving certain specific and pecuniary legacies, as to "all the residue of her estate and effects wheresoever and whatsoever," gave and bequeathed the same to the trustees, in trust for her sons—declaring that the shares of her said sons should be held upon such trusts and with and under such powers and restrictions as were before declared with respect to a sum given to her son John; which trusts were applicable only to personalty:—Held, that the lands in Little Bealings and Playford did not pass to the trustees either under the particular devise or under the bequest of the residue.

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THOMAS.
Devise to the
trustees.

Thomas, and to her son Graham Myers Pogson (since deceased), and to Edward Moor, John Henry Borton, and Thomas Clarkson, their heirs, executors, administrators, and assigns, according to the respective tenures thereof—all and singular her freehold messuage or tenement, lands, and hereditaments, *situate at Kesgrave aforesaid*, and also all those her two sets of chambers in Gray's Inn, in the county of Middlesex, with the appurtenances thereunto respectively belonging—upon trust that they her said trustees, or the survivors or survivor of them, or the heirs, executors, administrators, or assigns of such survivor, should with all convenient speed after her decease (unless they should deem it expedient to retain the said chambers longer in hand) make sale and absolutely dispose of the said hereditaments and premises, with their appurtenances, either altogether or in lots, and either by public auction or private contract, as he or they should think fit, and for such price or prices as to them or him should seem reasonable, with liberty for them or him to buy in the same hereditaments and premises, or any part thereof respectively, at any auction or auctions to be holden for the sale thereof, and to resell the same or any part or parts thereof at any future auction or private contract, without being liable to answer for any loss or diminution in price which might be occasioned by such resale; and also with liberty for them or him to consent to the abandonment or to any alteration in the terms or conditions of any contract which should be entered into for the sale of the said hereditaments and premises, or any part thereof, without being answerable for any loss that might arise thereby: and the said testatrix declared that the monies which should arise from such sale or sales should form part of her general personal estate, and should be paid, applied, and disposed of accordingly. And the said testatrix gave and bequeathed unto her son, the said Graham Myers Pogson, his heirs, executors, administrators, and assigns, according

to the tenure thereof, all and singular her messuage or tenement and lands at Monkstown, or Myersville, in the county of Dublin, in Ireland, with the appurtenances thereto belonging, to and for his and their own absolute use and benefit.

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v.
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And the said testatrix thereby gave and bequeathed unto the said George Thomas, Graham Myers Pogson, Edward Moor, John Henry Borton, and Thomas Clarkson, their executors, administrators, and assigns, out of her general personal estate, the sum of 20,900*l.* sterling, upon trust, as to the sum of 5,000*l.*, part thereof, for her daughter Jane Anna Pogson and her husband and issue, if any, as therein mentioned; and, as to the sum of 2,500*l.*, further part thereof, in trust for her son, the said Graham Myers Pogson, his executors, administrators, and assigns, for his and their absolute benefit; and, as to the sums of 2,700*l.*, 2,500*l.*, 2,500*l.*, 2,500*l.*, and 3,200*l.*, the residue thereof, in trust for her other children as therein mentioned.

And, after giving certain specific and pecuniary legacies, the testatrix declared, that, as to all the residue of her *estate and effects* wheresoever and whatsoever, she gave and bequeathed the same unto the said George Thomas, Graham Myers Pogson, Edward Moor, John Henry Borton, and Thomas Clarkson, their executors, administrators, and assigns, in trust for all and every her said sons, John Pogson, Graham Myers Pogson, George Thomas Pogson, Edward John Pogson, Francis Waskett Milward Pogson, and William Waldegrave Pogson, who should be living at her decease, and who should have attained or should afterwards live to attain the age of twenty-two years, in equal shares and proportions if more than one, and, in case there should be only one of her said sons living at her decease who should then have attained or should afterwards live to attain the age of twenty-two years, then in trust for such one of her said

Residuary
clause.

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THOMAS.

sons, his executors or administrators; and she thereby declared, "that the share or proportion of each of her said sons should be held upon such trusts for his benefit, and with and under such powers and restrictions in all respects as were thereinbefore mentioned and declared with respect to the said sum of 2,700*l.* thereinbefore given in trust for her said son John Pogson."

The said Emily Pogson made and published a codicil to her said will, bearing date the 13th day of February, 1836, but which did not in anywise affect her real estate.

Death of the
testatrix.

The said Emily Pogson departed this life in the month of February, 1836, without having revoked or altered her said will, except by adding the said codicil thereto, and without having revoked or altered the said codicil, leaving the said Graham Myers Pogson, her eldest son and heir-at-law, her surviving.

The said Graham Myers Pogson departed this life shortly after the decease of the testatrix, leaving no issue born at the time of his death, but leaving his wife Frances Anne Pogson (one of the defendants) enceinte, and having first duly made and published his last will and testament in writing, bearing date on or about the 9th March, 1836, executed and attested as by law required for rendering valid devises of real estate; whereby he gave and devised all his real estate whatsoever and wheresoever unto his wife, the said defendant Frances Anne Pogson, her heirs and assigns for ever.

Bill in Chan-
cery.

The said Edward John Pogson, Francis Waskett Milward Pogson, John Pogson, Jane Anna Pogson, and William Waldegrave Pogson, infants, by Edward Moor, their next friend, in April, 1836, filed their original bill of complaint in Chancery against the said George Thomas, Edward Moor, John Henry Borton, Thomas Clarkson, George Thomas Pogson, and Frances Anne Pogson, praying, amongst other things, that the will of the testatrix Emily Pogson might be established, and the trusts thereof car-

ried into execution, and that proper inquiries might be also directed to ascertain what real estates passed under and by virtue of her said will unto the trustees thereof upon the trusts for sale therein contained.

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THOMAS.

The defendant Frances Anne Pogson having on the 14th June, 1836, given birth to a son by her said late husband, the said Graham Myers Pogson, namely, Graham Myers Edward Pogson, who thereupon became the heir-at-law of his said deceased father, and also of the testatrix Emily Pogson, the plaintiffs in the first-mentioned suit filed their supplemental bill of complaint against the said Graham Myers Edward Pogson, praying that they might have the same relief against him as by the original bill was prayed against the several other parties.

By the decree made by the Master of the Rolls in the second-mentioned suit, bearing date the 12th December, 1836, it was declared that the will of the said Emily Pogson ought to be established; and it was, amongst other things ordered, that it should be referred to the Master to whom the said original cause stood referred to inquire and state what real estate the testatrix was possessed of was devised by her will to her trustees to be sold.

Decree establishing the will, and referring it to the Master.

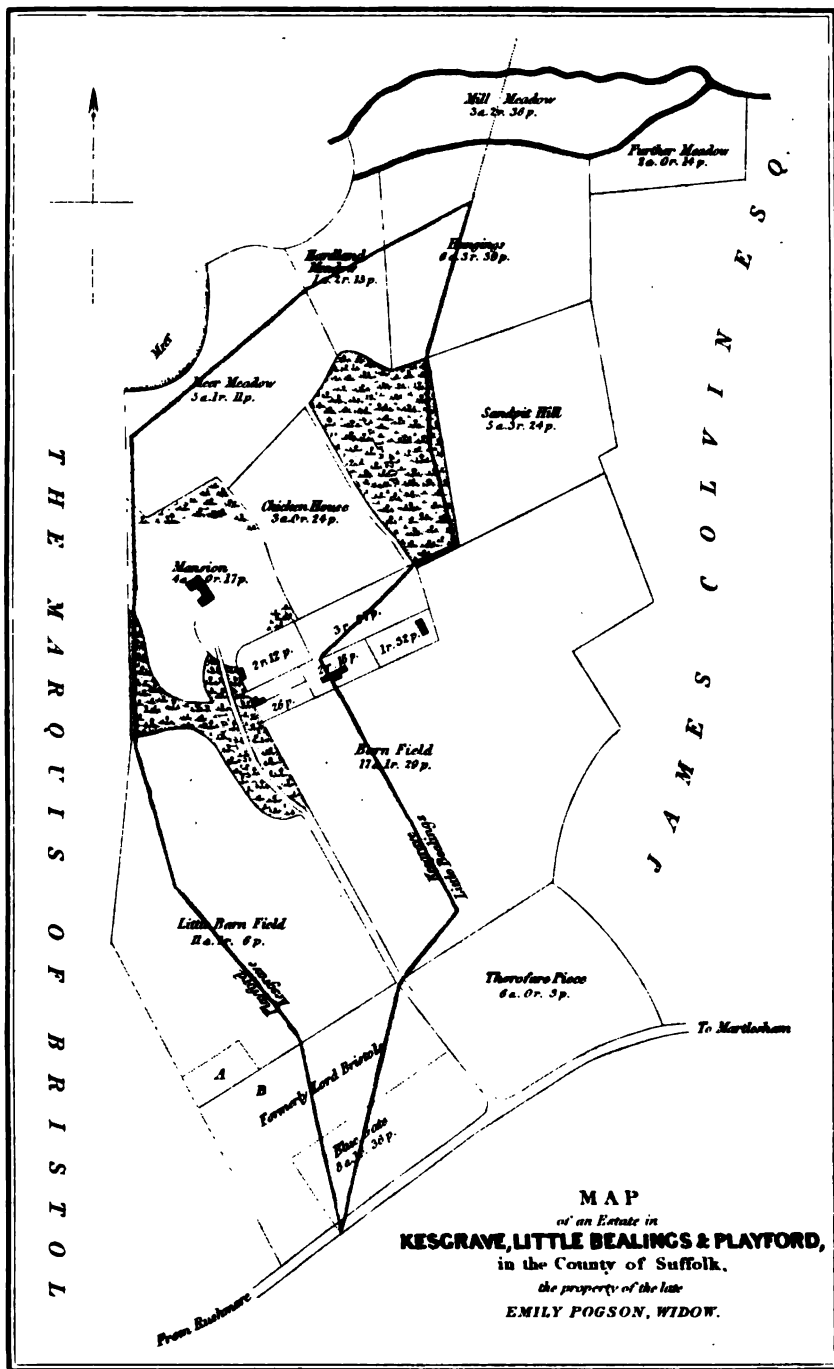
The Master to whom the causes stood referred, by his separate report, bearing date the 31st July, 1837, certified that the testatrix was at the time of her death possessed of the premises thereafter particularly mentioned, that is to say, all that capital messuage or Mansion-house called Kesgrave House, erected and built on the site or partially on the site of a capital messuage or mansion-house theretofore called or known by the name of Neakmear, with the barns, stables, outhouses, edifices, cottages, buildings, yards, orchards, lands, meadows, pastures, and feeding grounds thereto belonging or therewith held and enjoyed, and thereafter particularly mentioned, with their and every of their appurtenances, as the same were situate, lying, and being in Kesgrave aforesaid, Little Bealings,

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THOMAS.

and Playford, in the said county, or in some other town or towns thereunto near adjoining, and were theretofore in the occupation of William Cooper or his assigns; afterwards of George Thomas Esquire, grandfather of the defendant George Thomas, and Thomas Scott, his tenant; since, of George Thomas, the father of the defendant George Thomas, his tenants and assigns; and then of the said Thomas Pogson; and were formerly the estate and inheritance of the said George Thomas, the grandfather. And also all that piece or parcel of freehold meadow or pasture land, commonly called or known by the name of Lady Kemp's Meadow, or the Bell Meadow, or by whatever other name or names the same had been called or known, situate, lying, and being in Little Bealings, or in some adjoining parish or place, in the said county of Suffolk, containing by admeasurement *1a. 2r. 13p.* And the Master, after stating that it had been submitted to him by the plaintiffs that all the said premises were always considered and spoken of by the testatrix and treated by her as her property at Kesgrave, and were conveyed to Thomas Pogson, deceased, the husband of the testatrix by one and the same conveyance, and that the plaintiffs were advised and submitted that all the said property was devised by the testatrix by her said will, and was subject to the trusts of the said will; and stating, that, on the part of the defendant Frances Anne Pogson, it had been submitted that the testatrix was at the time of her death entitled to certain hereditaments and premises situate at Kesgrave aforesaid, and also to certain hereditaments and premises situate at a place called Little Bealings, and to certain hereditaments and premises situate at a place called Playford, all in the county of Suffolk (153), and that inasmuch as there were hereditaments and premises situate at Kesgrave sufficient to answer the devise, the heredita-

(153) See the map on the opposite page.



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 v.
 THOMAS.

Exception to
 the master's
 report.

ments and premises situate at Little Bealings and at Playford were not devised by the testatrix's will to her trustees to be sold: the Master certified that he was of opinion that the whole of the premises thereinbefore mentioned passed under the said will.

The said Frances Anne Pogson (who hath since intermarried with and is now the wife of Willie Bever), as such universal devisee under the will of her said late husband, Graham Myers Pogson as aforesaid, filed an exception to the Master's report, on the ground that the Master ought to have certified that the hereditaments and premises situate at Little Bealings and at Playford aforesaid did not pass by the testatrix's will: and, the said exception coming on to be heard before the Master of the Rolls on the 8th March, 1839, his lordship directed this case to be stated.

Question.

The question for the opinion of the court was—whether the lands in the parishes of Little Bealings and Playford in the pleadings in this cause mentioned (which are parishes distinct from but adjoining to the parish of Kesgrave) passed by the will of the said Emily Pogson, the testatrix therein named.

The case was argued in Hilary Term, 1840.

Coote, for the plaintiffs.—The lands in question situate in the parishes of Little Bealings and Playford passed by the will of Emily Pogson, either under the description of “all and singular my freehold messuage or tenement, lands, and hereditaments situate at Kesgrave aforesaid,” or under the general residuary devise.

1. As to the
 particular de-
 vise.

1. Undoubtedly, according to the modern authorities, there is some difficulty as to the admission of parol evidence to eke out the description of the property intended to pass by a will. But here the testatrix describes the lands as situate “at Kesgrave *aforesaid*,” no previous mention being made in the will of the *parish* of Kesgrave,

but only of Kesgrave House (154): and therefore no effect can be given to the word "aforesaid," unless it be held to refer to the *estate of Kesgrave*. Had the testatrix described the property as situate in "the parish of Kesgrave," many of the cases that will probably be relied on for the defendants would have been applicable. In *Doe d. Clements v. Collins*, 2 T. R. 498, A. being tenant for years of a house, gardens, stables, and coal-pen, bequeathed in the following words—"I give *the house I live in* and garden to B.:" the stables and coal-pen occupied by A. together with the house, were held to pass without being expressly named, though the testator used them for purposes of trade as well as for the convenience of his house. So, in *Goodtitle d. Radford v. Southern*, 1 M. & Sel. 299, it was held that a devise of "all that my farm called Trogues-farm, now in the occupation of A. C.," was not necessarily limited to the lands of Trogues-farm in the occupation of A. C., but might be shewn by evidence to extend to other lands of Trogues-farm not in his occupation. And in *Doe d. Beach v. The Earl of Jersey*, 3 B. & C. 870, the words "my Briton Ferry estate, with all the manors, advowsons, &c., thereunto belonging," were held to denote a property or estate known to the testatrix by the name of her Briton Ferry estate, and not an estate locally situate in a parish or township of Briton Ferry. In *Guy v. Sharp*, 1 Myl. & K. 602, the Lord Chancellor, speaking of extrinsic evidence, observes that it can never be received for the purpose of altering or controlling the sense of the will. The general principle is also recognized in *Ongley v. Chambers*, 8 Moore, 665, 1 Bing. 483.

2. Assuming that the lands in question did not pass by the particular devise, they clearly did pass under the general residuary devise to the trustees. That real estate

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(154) The only previous mention of Kesgrave in the will was in the testatrix's description—"Emily

Pogson, widow of the late Lieut. Col. Thomas Pogson, of *Kesgrave House*, in the county of Suffolk."

2. As to the residuary clause.

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 }
 POGSON
 v.
 THOMAS.

will pass under the words "all my estate," unless a distinct intention to the contrary is manifested, is a proposition so clearly established that it can scarcely be necessary to cite authorities for it—*Hogan v. Jackson*, Cowp. 299; *Doe d. Penwarden v. Gilbert*, 3 Brod. & B. 85, 6 Moore, 268; *Bradford v. Belfield*, 2 Sim. 264.

Rudall, for Frances Anne Pogson, the devisee of Graham Myers Pogson, the heir-at-law of the testatrix.—

1. As to the
 particular de-
 vise.

1. In Starkie on Evidence, 1st edit., Vol. 3, p. 1026, it is said, that, "In general, where there is any doubt as to the extent of the subject-matter devised by will, or devised, or sold, it is matter of extrinsic evidence to shew what is included under the description as parcel of it—*Doe v. Burt*, 1 T. R. 701. The question being whether a description in a lease, inter alia, of a piece of ground late in the occupation of A. (the piece of ground being a yard then in the occupation of A.), a cellar and certain wine vaults under it passed, evidence was admitted to prove, that, at the time of the lease, the cellar and vaults were not in the occupation of A., but were under lease to B., another tenant of the lessor, and that the defendant never claimed them until the expiration of B's lease. But, where a subject-matter exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object—see *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138. In the case of *Doe d. Sir A. Chichester v. Oxenden*, 3 Taunt. 147, the question was whether parol evidence could be admitted to shew that the testator, by a devise of his *estate at Ashton*, intended to devise all his maternal estate, consisting of two manors in the parish of Ashton, and one in the adjoining parish, the court, after hearing two arguments, decided against the evidence. Sir J. Mansfield, in giving judgment, referred to the cases of *Beaumont v. Fell*, 2 P. Wms. 140, and *Dowset v. Sweet*, Ambler, 175, and distin-

guished the present case on the ground that in those *the will would have had no operation unless the evidence had been received*; whereas in the present the will would have an *effective operation to pass all the estate within the parish of Ashton*, without the evidence proposed; that, in the other cases, the evidence was admitted to explain that which otherwise would have had no operation; and that it was safer not to go beyond that line. The same question was afterwards brought before the House of Lords—*Doe d. Orenden v. Sir A. Chichester*, 4 Dow, 65—where judgment was given corresponding with that of the court of Common Pleas.” In *Doe d. Beach v. The Earl of Jersey*, the property was described as “my Briton Ferry estate;” and the ground upon which that case proceeded, was, that it was known by that name. Here, however, the testatrix has nowhere described the property intended to pass by the particular devise to the trustees as her “Kesgrave estate,” nor is there anything on the face of the will to shew that it was known by that name. In *Doe d. Clements v. Collins*, the coal-pen was held to pass as being part of the house. The ground of the decision in *Goodtitle d. Radford v. Southern*, was, that, unless the extrinsic evidence was admitted, the will could have no complete operation. And *Ongley v. Chambers* turned upon the words “thereunto belonging,” which the court thought were not to be construed in the strict sense of appurtenant, as used in conveyances, but might in the case of a devise receive a much larger construction. In *Tuttesham v. Roberts*, Cro. Jac. 21, where a testator devised, inter alia, all those his lands and tenements lying in the parish of Cuckfield called Heselands, to his wife for life, and after her decease that it should remain to John, his son, and his heirs; and, after divers other clauses, he willed, that, if John died without issue, Heselands should remain to his three daughters in fee: the question was whether by this clause all the lands called Heselands, being an entire farm extending into

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Cleyton and into Cuckfield also, should pass, or only that which was in Cuckfield. Popham, Gawdy, and Yelverton held "that the daughters should take none of the lands in Cleyton, and that only so much of Heselands as extended into Cuckfield should pass; for, John by the devise hath clearly nothing but that which is in Cuckfield; for, the devise to the feme is of the lands in the parish of Cuckfield called Heselands, which passeth nothing but that which is in the parish of Cuckfield, it being first named. And if the words had been, of all his lands called Heselands in the parish of Cuckfield, and part of Heselands is in Cuckfield and part in Cleyton, nothing had passed but that which is in Cuckfield. As, if a man hath the manor of Dale, in Dale and Sale, and grants his manor of Dale in Dale, nothing in Sale shall pass." In *Doe d. Brown v. Greening*, 3 M. & S. 171, the devise was of "all the estate and interest whatsoever which I have or can claim, either in possession or reversion, of or in any lands or tenements and hereditaments at Coscomb:" and it was held that evidence was not admissible that another estate, not at Coscomb, was formerly united and had been ever since enjoyed with the estate at Coscomb, in order to shew that it passed under the devise. Dampier, J., speaking of *Doe v. Oxenden*, there observed that "nothing could be plainer than what the testator meant by his estate of Ashton, if the evidence had been admissible, for he called all his maternal property his Ashton estate." *Doe d. Brown v. Brown*, 11 East, 441, is also a strong authority to the same effect. Lord Ellenborough there says: "It would be going further than any case which we are aware of has yet gone, in admitting evidence of intent, from extraneous circumstances, to extend plain and unequivocal words in a will." All these cases shew, that, where the will is complete, intelligible, and unambiguous in itself, recourse cannot be had to extraneous matters for the purpose of shewing an intention different from that which is expressed. Upon this principle proceeded

the case of *Miller v. Travers*, 1 M. & Scott, 342, 8 Bing. 244. There, the testator devised "all his freehold and real estates whatsoever, situate in the *county* of Limerick, and in the *city* of Limerick," to certain trustees therein named, and their heirs. At the time of making his will he had no real estate in the *county* of Limerick, but he had a small real estate in the *city* of Limerick, and considerable real estates in the county of *Clare*: and it was held that parol evidence was not admissible to shew the testator's intention that his real estates in the county of *Clare* should pass by his will. "It may be admitted," says Tindal, C.J., "that, in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will: and this appears to us (the Lord Chief Baron Lyndhurst and himself) to be the extent of the maxim—*Ambiguitas verborum latens verificatione suppletur*."

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2. It may be conceded that real estate will pass under the words "all my estate," or similar words: but it is always a question of intention, depending upon the construction of the whole will. In the present case, it is impossible to look at the will without seeing that the testatrix knew well the distinction between a devise of real and a bequest of personal estate; and that a clear intention is manifested in the residuary clause to dispose of nothing but personal property; for, it is not possible to say that the trusts of the 2,700*l.* bequeathed to the testatrix's son John Pogson are applicable to real estate. In *Shaw v. Bull*, 12 Mod. 593, Trevor, C.J., says: "I confess, in construction of wills generally, the words 'my estate,' 'the residue

2. As to the residuary clause.

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of my estate,' or 'the overplus of my estate,' may well pass an inheritance, where the intent is apparent to pass it; but such intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the will and circumstances of the case: for, if the words be indifferent to real and personal estate, or may be applied to personal alone, there the heir-at-law is not to be disinherited by the implication of such words, or by any implication at all but what is a necessary one." In *Hogan v. Jackson*, Cowp. 299, the words of the residuary clause were, "all the remainder and residue of all my effects both *real* and personal." In *Doe d. Penwarden v. Gilbert*, 3 Brod. & B. 85, 6 Moore, 268, the construction of the residuary clause was aided by the introductory words of the will. And in *Bradford v. Belfield*, 2 Sim. 264, the words were "all my goods, chattels, personal and testamentary estate:" and there was nothing on the face of the will to shew that the testator did not intend to include real estate. In *Tilley v. Simpson*, 2 T. R. 659, n., the testator, after declaring that he intended to dispose of *all his worldly estate*, and making several devises to different persons, gave and bequeathed *all the rest and residue of his money, goods, chattels, and estate whatsoever* to his nephew A. B.: and the question was whether a beneficial interest in a real estate not before disposed of would pass to the nephew by this devise. Lord Hardwicke, C., was of opinion that it would; and said: "Where the court had restrained the word *estate* to carry personal estate only hath been where it hath appeared that it was the intention of the testator it should be so understood; as, where it hath stood coupled with particular descriptions of part of the personal estate, as, a bequest of all my mortgages, household goods and *estate*, in which the preceding words are not a full description of the personal estate." The use of the word "estate," therefore, is clearly not enough of itself to carry real estate. In *Woollam v. Kenworthy*, 9 Ves. 137,

Lord Eldon says: "The question, whether the words 'all my estate and effects' will include a real estate or not, depends, first, upon the immediate context of the will, secondly, upon the general form and scheme of the will, as demonstrating the intention." *Doe d. Spearing v. Buckner*, 6 T. R. 610, is precisely in point. There, the testator having given 4,000*l.* to A. and B. in trust for certain persons, by a residuary clause gave "all the rest of his estate and effects of what nature soever to A. and B., their executors and administrators, in trust to add the interest to the principal, so as to accumulate the same, it being his will that the residue should not pass but at the time and manner as the principal sum of 4,000*l.* was directed to be paid:" and it was held that a house, the only freehold of which the testator was seised, did not pass by the will, notwithstanding there were general words in the introductory clause "as to all his *estate* and effects *both real* and *personal*." Lord Kenyon said: "It is our duty to give effect to the intention of the testator, if that can be discovered; but, if we cannot find out that intent, the title of the heir-at-law must prevail; and it is on the latter ground that my opinion proceeds in this case. I do not see any words in the will to disinherit the heir-at-law. The testator set out in the beginning of his will as if he had intended to dispose of all his property. But, though those general words would have shewn his intention if there had been subsequent words in the will to carry that intention into execution, as was held by Lord Talbot, in *Ibbetson v. Beckwith*, Cas. temp. Talb. 157, it has been held in a variety of cases that alone they are not sufficient to dispose of a fee. And by adverting to the residuary clause there are no words to pass the estate in question." Here there is a clear demonstration of an intention to apply the residuary clause to personal estate only. In *Doe d. Hick v. Dring*, 2 M. & Sel. 448, it was held that a devise of "all and singular my *effects* of what nature or kind soever," will

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not pass real estate, where it cannot be collected from the will itself that such was the testator's intention. "If," says Lord Ellenborough, "I were asked my private opinion as to what this testator really meant when he made use of the word, I must suppose that he meant, that which his duty prescribed to him, to convey all his property for the maintenance of his family; but, sitting in a court of law, I am not at liberty to collect his meaning from matter dehors, but only from the expressions used on the face of the will. The rule of law is peremptory that the heir shall not be disinherited unless by plain and cogent inference (155) arising from the words of the will." *Doe d. Hurrell v. Hurrell*, 5 B. & Ald. 18, *Newland v. Marjoribanks*, 5 Taunt. 268, and *Doe d. Bunny v. Rout*, 7 Taunt. 79, are also authorities to shew that the import of general words in a will may be restrained or extended by the context.

Coote, in reply.—1. In *Doe d. Chichester v. Oxenden*, *Doe d. Brown v. Greening*, *Doe d. Brown v. Brown*, *Miller v. Travers*, and the other cases cited, the attempt was, to shew by extrinsic evidence that the testator intended to give that which the words he had used were not calculated to pass. If the description here were in itself complete, the argument of course would fail: but if, upon the proper construction of the words the testatrix has used, "Kesgrave aforesaid" must of necessity refer to the estate at Kesgrave House, then the authorities cited on the other side have no application. 2. That the words used in the residuary clause are sufficient of themselves to pass real

(155) Sir J. Mansfield, in *Newland v. Marjoribanks*, 5 Taunt. 271, observing upon words similar to these, says: "The latter words, though ordinarily used, I never could assent to; they first got into a case in *Vaughan*, 262, *Gardner v. Sheldon*, where there was an

implication, and they have since crept into cases where there was no implication. The absurdity has since been pointed out in *Willes*, 141, *Moon d. Fag v. Heaseman*." And see *Roe d. Helling v. Yeud*, 2 N. R. 220.

estate could not well be disputed: and it is equally clear that the whole is a question of intention. The testatrix, it is evident, did not mean to die intestate as to any part of her property.

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Cur. adv. vult.

The following certificate was afterwards sent to the Master of the Rolls:—

“ We have heard this case argued, in the absence of the Lord Chief Justice upon the Special Commission at Monmouth, and of Mr. Justice Coltman, who was engaged at Nisi Prius. We have considered it; and we are of opinion that the lands in the parishes of Little Bealings and Playford in the pleadings in this cause mentioned, and which are stated to be parishes distinct from but adjoining to the parish of Kesgrave, did not pass by the will of Emily Pogson, the testatrix therein mentioned.

“ J. B. Bosanquet.

“ T. Erskine.

“ W. H. Maule.”

DEVAUX and Another v. STEELE.

THIS was an action of assumpsit upon a policy of insurance.

The declaration stated that the plaintiffs, theretofore, to wit, on the 28th October, 1835, according to the usage and custom of merchants, caused to be made a certain policy

*Saturday,
May 9th.*

By a law of France relating to the whale fishery, it is provided that “ the vessel which shall have fished either in the Pacific

Ocean, by doubling Cape Horn or by passing through the Straits of Magellan, or to the south of Cape Horn at 62 degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back, in the produce of its fishery, one half at least of its burthen, or if it can prove a navigation of sixteen months at least.”—Held, that, to entitle a vessel (which had not performed a navigation of sixteen months) to the benefit of this provision, it was necessary that some part at least of the produce of her fishing should be taken in the fishing latitudes pointed out by the law.

Supposing the bounty not to be payable as a matter of right, under the strict interpretation of the law:—Held, that the chance of receiving this bounty on her return, founded upon an alleged invariable course and practice of the French Government in its administration, though almost amounting to a moral certainty, did not constitute an insurable interest.

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of insurance, &c., lost or not lost, at and from Nantes to the South Sea fishery, during her stay and fishing within or without the limits of the fishery, and at and from thence to any port or ports in France, with permission to call at all ports and places whatsoever and wheresoever, for all purposes, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called Le Henri; beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship, upon the said ship &c., to continue and endure during her abode there, upon the said ship &c.; and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever, should have arrived at as aforesaid, upon the said ship &c., until she had moored her anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same were there discharged and safely landed; and it should be lawful for the said ship &c. in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to that insurance: the said ship &c., goods and merchandizes &c., to be valued at 800*l.*: and by a certain memorandum thereunder written, it was declared that the said insurance was to the amount of 800*l.* *on bounty allowed by the French Government on the tonnage of the ship, agreed to be valued at 800*l.** Averment, that, in consideration that the plaintiffs, at the request of the defendant, had then paid to the defendant a certain sum of money, to wit, the sum of 33*l.* 12*s.*, as a reward or premium for the insurance of 400*l.* of and upon the said bounty in respect of the said ship or vessel on the said voyage in the said policy of insurance mentioned, and had then promised the defendant to perform and fulfil all things in the said policy of insurance contained on the part and behalf of the insured to be performed and fulfilled, the defendant promised the plaintiffs that he the defend-

ant would become and be an insurer to the plaintiffs of the said sum of 400*l.* upon the said bounty in the said policy of insurance mentioned, and would perform and fulfil all things in the said policy of insurance on his part and behalf as such insurer of the said sum of 400*l.* to be performed and fulfilled; and the defendant then became and was an insurer to the plaintiffs, and duly subscribed the said policy of insurance as such insurer, of the said sum of 400*l.* upon the said bounty in the said policy in that behalf mentioned: that theretofore, to wit, on the day aforesaid, the said ship departed and set sail from Nantes aforesaid on her said voyage towards the South Sea fishery aforesaid, and destined for the completion of the said voyage to a port in France, to wit, Nantes; and afterwards, to wit, on the day aforesaid, prosecuted her said voyage in the said fishery, and then obtained on occasion thereof a certain cargo: that the said bounty in the policy of insurance mentioned would have been allowed by the French Government upon the tonnage of the said ship, if the said ship with the said cargo on board had arrived in France, to wit, at Nantes aforesaid: that the said bounty, just before and at the time of the loss of the said ship thereafter mentioned, was of great value, to wit, of the value of 800*l.*, conditioned upon the said arrival as aforesaid: Averment of interest: that afterwards, and whilst the said ship was proceeding on her said voyage, and before her arrival as aforesaid according to the said policy, to wit, on the 19th December, in the year aforesaid, she by the perils of the seas was wrecked, and with the said cargo was totally lost, whereby the said bounty was wholly lost to the plaintiffs; of all which said several premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiffs to pay them the said sum of 400*l.* so by him insured as aforesaid, and which said sum of 400*l.* he the defendant ought to have paid, according to the form and effect of the

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First plea—
ship and bounty
not lost.

said policy of insurance and his said promise and undertaking so by him made as aforesaid: Money counts and account stated: Breach, non-payment.

The defendant pleaded—first, that the said ship in the policy of insurance in the first count mentioned was not wrecked or lost, and the said cargo and bounty were not nor was any part thereof lost, modo et formâ—concluding to the country.

Second plea—
want of interest.

Secondly—that the parties alleged to be interested in the subject-matter of the insurance, were not interested, as alleged—concluding to the country.

Third plea—
that the ship
did not obtain
any cargo in the
fishery.

Thirdly—that the said ship in the policy of insurance in the first count mentioned did not prosecute her said voyage in the said fishery, and did not obtain on occasion thereof any cargo whatsoever, modo et formâ—concluding to the country.

Fourth plea—
that the bounty
insured was a
bounty allowed
under a certain
written law;
and

Fourthly—that the said bounty in the said policy of insurance and first count mentioned, and which was the subject-matter of the said insurance, was a certain bounty allowed by the French Government under a certain written law of France relating to whale fishery, which said law, being translated, was as follows, that is to say—"The vessel which shall have fished either in the Pacific Ocean by doubling Cape Horn or by passing through the Straits of Magellan, or to the South of Cape Horn at 62 degrees of latitude at the least, shall obtain on its return a supplemental bounty if it brings back, in the produce of its fishery, one half at least of its burthen, or if it can prove a navigation of sixteen months at the least;" that, according to the true intent and meaning of the said policy of insurance, the subject-matter of insurance in the said policy mentioned was the bounty allowed by the French Government under and by virtue of the said law of France only, and not otherwise; that, although the said ship in the said policy of insurance mentioned prosecuted her said voyage in the said fishery, and had before the loss in the first

count mentioned fished within the limits of the said fishery, that is to say, in the Pacific Ocean by doubling Cape Horn, and although the said ship had before the said loss obtained a certain cargo, *no part of the said cargo had been obtained within the limits of the said fishery in the said law of France mentioned*, that is to say, either in the Pacific Ocean by doubling Cape Horn or by passing through the Straits of Magellan, or to the southward of Cape Horn at 62 degrees of latitude at the least; *and the said cargo, and every part thereof, was obtained before the said ship or vessel had arrived within the limits aforesaid*, and not otherwise; that, according to the said law of France, the said bounty in the said policy of insurance mentioned would not, according to the true intent and meaning of the said policy, have been allowed by the French Government under or by virtue of the said law, if the said ship, with the said cargo in the first count mentioned on board thereof, had arrived in France, as in the said first count mentioned: without this that the said bounty in the policy mentioned would have been allowed by the French Government on the tonnage of the said ship, if the said ship with the said cargo on board had arrived in France, modo et formâ—concluding to the country.

Fifthly—that the loss in the first count mentioned happened and accrued to the said ship or vessel in the first count and policy of insurance mentioned, before the commencement of any of the risks in the said policy of insurance mentioned and therein insured against—verification.

Sixthly—Payment into court on the second and last counts, of 33*l.* 12*s.*, the amount received for premium.

The plaintiffs joined issue on the first, second, third, and fourth pleas, traversed the fifth, and accepted the sum paid in in satisfaction and discharge of the causes of action in the second and last counts.

By a judge's order bearing date the 3rd April, 1838, the

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that the assured
were not under
that law enti-
tled thereto:

Absque hoc,
that the bounty
would have
been allowed.

Fifth plea—
that the loss
happened be-
fore the incep-
tion of the
risk.

Sixth plea—
payment of
premium.

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following case was stated for the opinion of this court, pursuant to the statute 3 & 4 Will. 4, c. 42, s. 25 :—

The plaintiffs are insurance brokers in London, and were the agents of J. A. Francois, and A. Francois, using the firm of Jacques Francois, Frères, French merchants at Nantes, who at the time of effecting the policy and at the time of the loss were the owners of the French ship called *Le Henri*. On the 28th October, 1835, the defendant subscribed the policy of insurance set out in the declaration for the sum of 400*l*.

The bounty referred to in the said policy was the bounty allowed by the French Government, to encourage the Whale fishery. On the subject of this bounty, the following law of the 22nd April, 1832, and Royal ordonnance of the 26th April, 1833, are in force, and were so at the time of the insurance and loss as set forth in the following translated extracts of such parts as have been deemed material to the present question :—

“ LAW ON THE WHALE FISHERY.

Art. 1.
 Amount of
 bounty.

“ Art. 1. The bounty granted to the fitting out of vessels for the whale fisheries [aux armemens pour la pêche de la baleine], whether it be in the North Seas or in the Southern Ocean, shall be 70*f*. per measurement ton from the 1st March, 1832, to the 1st March, 1833, where the ships' companies shall without exception consist of Frenchmen: this bounty shall be diminished 4*f*. every year, in such wise that it shall only amount to 54*f*. from the 1st March, 1836, to the 1st March, 1837. The bounty shall be 48*f*. upon all vessels fitted out of which the crew shall partly be composed of foreigners, according to the limitation fixed by article 4, herein-after given: the bounty shall be reduced 2*f*. every year, in such wise that from the 1st March, 1837, it will be reduced to 40*f*.

Art. 2.
 Limits of the
 fishery.

“ Art. 2. The vessel which shall have been fishing [qui aura fait la pêche], whether in the Pacific Ocean either by doubling Cape Horn or by passing through the Straits of Magellan, or to the Southward of Cape Horn at 62 degrees of latitude at the least, shall obtain on her return a supplemental bounty, provided she shall bring home in the produce of her fishing one half at least of her burthen, or it shall be proved that her voyage has occupied sixteen months at least (156). This supplemental

(156) The translation not being a joined :—“ *Le navire qui aura fait la*
 very good one, the original is sub- *pêche, soit dans l'Océan Pacifique en*

bounty shall be 50*f.* per ton upon vessels manned without exception by Frenchmen, and shall decrease 3*f.* every year, in such wise that it shall only amount to 38*f.* upon vessels sailing between the 1st March, 1836, and the 1st March, 1837—24*f.* upon vessels the crews of which shall be composed partly of Frenchmen and partly of foreigners, and shall decrease 1*f.* every year, in such wise that it shall only amount to 20*f.* from the 1st March, 1836, to the 1st March, 1837.

" Art. 3. The supplemental bounty shall be reduced one half for such vessels as shall have fished to the Eastward of the Cape of Good Hope, at 45 degrees at least of longitude from the meridian of Paris, and at 48 to 50 degrees of south latitude.

" Art. 4. In order to have a right to the bounty, the crews of vessels which shall be composed partly of Frenchmen and partly of foreigners, shall consist of not more than one third foreigners, being officers, harpooners, or masters of boats, the number of which shall not exceed two for the Southern fishery and five for the Northern fishery. The owners of vessels destined for the whale fishery shall be bound, even in case of their renouncing the bounty, to confide the charge of them, as far as regards officers, masters of boats, and harpooners, to at least one half French seamen, under the penalty of being deprived of the enjoyment of the privileges attached to the national flag.

" Art. 7. Royal ordonnances shall determine the nature of the applications which shall be required of the owners previous to paying the outward bounty—the proofs to be furnished shewing that the voyage has been accomplished—the form of the documents for the liquidation of the bounty."

" THE ROYAL ORDONNANCE.

" No. 4773. *Decree of the King relative to the Bounties for the Whale Fishery.*

" Art. 5. On returning from the fishery, every captain of a whaling vessel shall present himself before the commissary of marine of the port to which he returns, to declare the name and tonnage of the vessel, the port at which she was fitted out, the name of the owner, the date of his departure from France, *the places where he effected his fishing* [les lieux où il a effectué sa pêche], the duration and circumstances of his voyage, the date of his return, and the nature and net weight of the produce of his fishing.

The commissary of marine, after having interrogated and heard, collectively or separately, the men composing the crew, to assure himself by their declarations, compared with the ship's journal, and the report made

doublant le cap Horn ou en franchissant le détroit de Magellan, soit au sud du cap Horn à soixante-deux degrés de latitude au moins, obtiendra au retour un supplément de prime,

s'il rapporte en produits de sa pêche la moitié au moins de son chargement, ou s'il justifie d'une navigation de seize mois au moins."

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Art. 3.
Where fishing
to the eastward
of the Cape of
Good Hope.

Art. 4.

Art. 7.

Royal ordon-
nance: April
26, 1833.

Art. 5.

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by the captain, whether the destination of the expedition had been fulfilled, shall state at the foot of the declaration of the captain the result of such examination.

An official copy of this document (Form No. 5) shall be delivered to the captain to be by him addressed, or by the owner, to our minister of commerce and of public works within the space of three months at the latest after the return of the vessel. A second official copy of this declaration shall be addressed by the commissary of marine to our minister secretary of state of the marine, to be transmitted to our minister of commerce and public works.

Art. 6.

" Art. 6. Independently of this declaration, the captain shall make application to the administration of the customs for the survey and immediate verification of the description and weight of the produce of the fishery forming his cargo. The result of this operation shall be noted in a 'procès verbal,' of which shall be transmitted direct to our minister of commerce and public works an authentic official copy, at the foot of which the administration of customs shall state whether the vessel has fulfilled the obligation of bringing home in the proceeds of her fishing at the least one half of her burthen (Form No. 6)."

" Liquidation of Bounties.

Art. 9.

" Art. 9. The liquidation of bounties fixed by articles 1, 2, and 3 of the law before cited, shall be effected by our minister of commerce and public works, on the transmission to him in due form of the under-mentioned documents"—amongst others the following :—

Form No. 5.

District of

" WHALE FISHERY.

Sub-District of

Declaration of Return (Form No. 5).

Marine.

Numerical order
 in Register

Port of

Name of vessel.

Before _____, commissary of marine of this port, I the undersigned _____, captain of the French whaling vessel the _____ measuring _____ tons _____ 94ths, fitted out at _____, the _____, by _____, and sailed from France the _____, declare that I came into this port the _____, after having been engaged _____ months in the whale fishery in the _____ seas, and that I have brought home of my fishing (*state here the nature and the weight in killogrammes of the different produce of the fishing*), composing my cargo, and proceeding solely from the fishing made [*la pêche faite*] by the said vessel. (*Report further the principal circumstances of the voyage.*)

" In faith of which I have signed the present de-

claration, and produce in support thereof my ship's journal.

" At ———, the ———.

" (Signed) ———.

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" We ———, commissary of marine at the port of ———, having interrogated and heard the men composing the crew of the ship ———, and, having compared their declarations with that of the captain, and with his ship's journal, consider the said expedition has fulfilled all the conditions stipulated in the recognizance [soumission (157)] of the owner, conformably to the law of the 22nd April, 1832, and the Royal Ordonnance of the 26th April, 1833.

" At ———, the ———.

" Seen by the commissary of marine,

" ———.

" N. B. The present declaration must be stamped and legalized before being presented to the administration of commerce and public works."

" Seen for legalization of the signature of M. ———, Commissary of Marine at the port of ———.

" The minister secretary of state for the marine and colonies."

WHALE FISHERY.

Form No. 5.

" *Procès Verbal of Verification of Cargo.*

(Form No. 6).

" We the undersigned ——— of the customs of this port, upon the demand of M. ———, captain of the whaling vessel the ———, measuring ——— tons ——— 94ths, fitted out at ——— by ———, which sailed from France the ———, and came into this port the ———, proceeded to the examination and verification of the description and weights of the produce of the fishing forming her cargo, and have ascertained that it is composed of &c. &c., which we consider forms more than half her loading; for which reason we are of opinion that the said vessel has fulfilled the obligations imposed in this respect by Art. 2 of the law of the 22nd April, 1832, in the case of a voyage of sixteen months. Done at ——— the ———, 18..

(157) This is required by Art. 1 of the Royal ordonnance of the 26th April, 1833.

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"N. B. This certificate must be stamped and legalized before being presented to the administration of commerce and public works."

"Seen by the Sub-inspector.

"Seen and registered by the principal receiver under No. —."

"Seen by the Director.

"Seen for the legalization of the signature of M. —, Director of the Customs at Paris, the —, 18. ."

Vessel sailed.

The ship *Le Henri*, manned with French seamen, sailed from Nantes, a port in France, on the 28th February, 1835, for the South Sea whale fishery. All the conditions required by the law and ordonnance above set out to be fulfilled previous to sailing having been fulfilled before and at the time of setting sail.

Fish caught.

The vessel fished, and caught twenty-one whales between the beginning of June and the end of October, 1835. Six of these whales were caught near the island of Tristan da Cunha (158) on the Eastern coast of South America, and the rest off Great Fish Bay and other parts along the coast of Africa. The oil obtained from these twenty-one whales was stowed, and formed more than half a cargo.

Ship doubled
Cape Horn.

At the end of October, or beginning of November, 1835, the ship doubled Cape Horn, and went into the Pacific Ocean with the intention of catching fish in the seas beyond Cape Horn, and so completing her cargo. *No fish were taken after the vessel doubled Cape Horn* (although a great number of whales were seen), because the ship was prevented by the continued bad weather.

Wrecked.

On the 24th December, 1835, the ship was wrecked off the Isle of Lemas (159) and wholly lost, together with the said proportion of her cargo which she had obtained.

(158) In the South Atlantic Ocean: longitude, about 14 degrees West of Greenwich; latitude, 37 degrees South.

(159) In the South Pacific Ocean: longitude, 75 degrees West from Greenwich; latitude, 46 degrees South.

On behalf of the plaintiffs a case was stated for the opinion of MM. Dupin and Delangle, deans of the order of advocates of the Cour Royale at Paris, upon the construction of the law of the 22nd April, 1832. These gentlemen were of opinion that the bounty in question would have been payable to the owners of *Le Henri* under the circumstances—the object of the law being equally attained whether the cargo consisted of whales taken before or after doubling Cape Horn or reaching the prescribed latitude, and the letter of it only requiring that the vessel shall have “fished” there, not that the cargo she brings home shall have been actually caught there.

A case was also submitted, on behalf of the defendant, to Messrs. Blanchet, De La Grange, and Odillon Barrot, advocates of the Cour Royale at Paris. They were clearly of opinion that the bounty in question was not of right payable in respect of a vessel returning to France after a course of fishing such as that of *Le Henri* (160).

The following question was, on behalf of the plaintiffs, submitted to M. Senac, the chief clerk in the office of the minister of commerce at Paris for the liquidation of bounties:—“Whether, according to the course and practice of

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Opinions of advocates.

Opinion of Senac, chief clerk in the office of the minister of commerce.

(160) This opinion contained the following passage:—“The French Government may possibly interpret the law and the ordonnance in a manner extremely favorable to the ship-owners: at all events, this interpretation would be the effect of the paternal but self-directed kindness of the administration towards the shipping interest and commerce, but would be in opposition to the letter and spirit of the law: and, after the information collected in the offices, there is no doubt but that, in the case of an insurance of bounty, Govern-

ment would never approve of an interpretation the result of which would be to paralyze the effect of the law, by giving to the very mischances of navigation an indemnity which is only granted to its success. There is no question of protection and of kindness between the ship-owner and the insurer, but merely of justice: the strictness of its law must be applied, such as it results from the express declaration of the law, and from the requisitions of the ordonnances of 1833.”

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his office, the supplementary bounty mentioned in the 2nd article of the law respecting the whale fishery, dated at Paris, the 22nd April, 1832, would or would not be payable and paid to the owners of a French whaling ship sailing from France and outfitted according to the 1st article of the said law, which had taken whales in the Atlantic Ocean so as to have procured thereby more than half a cargo of oil, and afterwards to have doubled Cape Horn and navigated the Pacific Ocean for the purpose of continuing her fishing, but not to have actually caught any fish in the Pacific Ocean, and then to return to France with more than half a cargo of oil, the produce of her fishing, on board."

To this question, M. Senac returned the following answer:—"The law of the 22nd April, 1832, (art. 2), grants a bounty upon return to vessels which, having fished in the Pacific Ocean, shall give proof of sixteen months' navigation, or that they have half their burthen in the produce of their fishing. The government does not make any inquiry into the matter, to ascertain whether the produce has been or has not been fished beyond or on this side of Cape Horn: the right to the bounty is acquired by either the one or the other of the two alternative conditions prescribed by the law. This is the rule in the business."

It was agreed that the opinions of the advocates above referred to, and the opinion or certificate of M. Senac, should be taken to be evidence, the same as they would have been if given on oath upon the trial of the cause, subject to any legal objections to the admissibility of the evidence given. And it was agreed that the court should have the same power as the jury would have had of drawing any inference of fact from the circumstances and documents above set forth.

Question.

The question for the opinion of the court was—whether the plaintiffs were entitled to recover upon all or any of the issues joined in the pleadings: if the court should be

of opinion that the plaintiffs were entitled to recover, then the judgment was to be entered for the plaintiffs for the sum of 400*l.*; but, if the court should be of a contrary opinion, then a *nolle prosequi* was to be entered, or otherwise as the court might think fit.

The case was argued in Trinity Term, 1839.

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Wilde, Serjeant (*Barstow* was with him), for the plaintiffs.—To entitle the owners upon the return of their vessel to the supplemental bounty given by article 2 of the law of the 22nd April, 1832, it was not necessary that the half cargo, or any part of it, should be the produce of whales taken in the Pacific Ocean. The object of the law evidently was, the encouragement of a nursery for seamen inured to the most difficult and dangerous voyages: and the way in which this object is to be attained, is, either by a navigation of sixteen months' duration, or by encountering the perils of a voyage into the Pacific Ocean by doubling Cape Horn or passing through the Straits of Magellan. The obtaining a certain quantity of oil is required in order to prove that the vessel has been *bonâ fide* employed in fishing: but there is nothing in the law that renders it essential that the fish should be caught in the Pacific. There is no more danger encountered in fishing there than upon the coast of Africa: it is the doubling the Cape, or passing the Straits, that calls for the exercise of cool courage and dexterous seamanship. The alternative of a sixteen months' navigation plainly shews that the place where the cargo is obtained was not considered material; for, in that case, it is not necessary that a single fish should be caught (161).

1. As to the construction of the French law.

This insurance was made after the parties had had experience and knowledge, or means of knowledge, as to

2. As to the nature of the interest.

(161) This assumes that the words "*qui aura fait la pêche*" would be satisfied by merely sailing amongst the whales, without even lowering a boat.

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construction put upon the law of 1832 by those who were entrusted with its execution. Merchants would naturally be governed in the fitting out of whalers, and underwriters in insuring, by the course adopted in the administration of the bounty: and if, though not payable according to the strict and literal interpretation of the law, the French Government nevertheless, from whatever motive, would according to the established course and practice have allowed this bounty, the merchants had an insurable interest and the loss is a loss by a peril insured against. That the bounty would in this case have been allowed by the French Government, is clear from the certificate of M. Senac. There are many cases to shew that an interest of this description is insurable. Thus, in *Le Cras v. Hughes*, Park Ins. 6th edit., 358, the facts were these:—Captain Luttrell, commanding five of his majesty's ships, and Captain Dalrymple, commanding a party of the land forces, captured two Spanish register ships lying under the protection of Fort Omoa. The ship *St. Domingo* (on which the insurance was made) was one of the prizes, and was coming home laden with the property then captured. Upon this ship the defendant underwrote 500*l.*; and she was lost by perils of the sea. The question was, whether by virtue of the prize act, 19 Geo. 3, c. 67, the officers and crews of the ships under Captain Luttrell had such an insurable interest in the *St. Domingo* as to entitle them to recover. Lord Mansfield said: "There are two questions in this cause—first, whether the sea officers had an insurable interest: this will depend on the prize act and proclamation:—secondly, whether possession would entitle them to insure, upon the bare contingency of a future grant from the Crown. As to the first, consider the act of parliament, which gives to all the people on board, that is, to the flag officers, commanders, and other officers, to the seamen, marines, and soldiers on board every ship and vessel of war, the sole interest and property of and in all and every ship

and vessel, goods, and merchandizes which they shall take during the war, after condemnation. Does the act say that the seamen only shall take? does it leave a joint capture by the army and navy undefined? Certainly not. Suppose, for instance, a case which I remember to have happened—a Dutch and English fleet combined captured some ships; the English sailors could not take solely; nor could the act mean that they should have nothing. In the case in question, suppose Captain Dalrymple had given no assistance, is there any doubt that Captain Luttrell would have taken the whole? The only difference is, that now he has not the merit of a sole capture. The word ‘soldiers’ in the proclamation, means soldiers on board the ship. Thus it stands on the act and proclamation. But, supposing that doubtful, as far back as Queen Anne’s time down to the present, wherever a capture has been made by a king’s ship or a privateer, the Crown has always given a grant of it after condemnation. There is no instance to the contrary. Is, then, the contingency of the ship’s coming safe such an interest as the captor may insure? Insurance is a contract of indemnity; some interest is necessary, but not any particular form of interest; it does not depend on a vested formal interest. The question is, whether this contingency is such a benefit to the assured as will make it a loss to him if the ship does not arrive. An insurance on the profits of a voyage [*Grant v. Parkinson*, Park Ins. 354, *Flint v. Le Mesurier*, Id. 355,] was holden to be good. An agent of prizes may insure the arrival of a ship which will produce him profit; for, though he has not the possession of the property, he has such an interest in the ship coming home as that he may insure. Here, the possession is in the assured, and a certain expectation of receiving the property captured from the Crown, which gives him an interest in the arrival. It is not a vested interest, but such an expectation as never was defeated.” *Boehm v. Bell*, 8 T.R. 154, *Barclay v. Cousins*, 2 East, 544, *Henricksen v. Marget-*

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son, 2 East, 549, n., *Stirling v. Vaughan*, 11 East, 619, and *King v. Glover*, 2 N. R. 206, are all distinct authorities to shew that a reasonable expectation of profit is an interest that may be the subject of insurance. And the authority of these cases is not materially affected by *Hodgson v. Glover*, 6 East, 316, *Routh v. Thompson*, 11 East, 428, or *Lucena v. Craufurd*, 2 N. R. 206: the ground upon which the last-cited case ultimately proceeded, was, that the commissioners had no interest in the ships insured until they came within the ports of the realm (162). There is nothing here approaching to mere "expectation" in the sense used in any of the cases. The anticipation that good faith will be observed by a civilized government is not like a speculative and uncertain expectation which may be defeated without any breach of good faith on the part of any body. If this bounty would in point of fact have been allowed, whether as matter of right or as an act of grace—if it would, according to the undeviating course and practice of the French Government, have been paid without inquiry as to whether the fishing within the prescribed limits had been successful or not—the expectation of receiving it clearly was an interest that was susceptible of insurance.

1. As to the construction of the French law.

R. V. Richards, for the defendant.—The meaning of the law of the 22nd April, 1832, is perfectly plain and intelligible. To entitle the owners of a whaler to the supplemental bounty provided by the 2nd Article, she must have *fished* in the Pacific Ocean either by doubling Cape Horn or by passing through the Straits of Magellan, or to the Southward of Cape Horn at 62 degrees of latitude at the least, and brought home in the produce of her fishing (that is, of her fishing within the prescribed limits) one half at least of her burthen, or it must be proved that her voyage (subject to the same qualification as to limits) has occupied

(162) See *Craufurd v. Hunter*, 8 T. R. 13, and *Lucena v. Craufurd* (in error), 3 B. & P. 75.

sixteen months at the least. A mere intention to fish there will not suffice. This is rendered still more clear by the Form No. 5, in which the captain is required to declare on his return the time during which he was engaged in fishing, and the locality. Would a vessel be entitled to the bounty in respect of a sixteen months' voyage, merely because she had fruitlessly consumed a week or two within the prescribed latitudes? Clearly she would not have "fait la pêche" within the meaning of the law.

It may be conceded that the profits of an adventure are a legitimate subject of assurance; and that the bounty in question might be insured, provided the owners had acquired a legal *right* to it. The ground upon which *Stirling v. Vaughan*, 11 East, 619, proceeded, was, that the captors had *by law* an interest in the prize; and not, as here, a mere expectation (whether well or ill-founded is immaterial) that the French Government would not insist upon a strict and literal interpretation of the law—which is the utmost that M. Senac's certificate amounts to. *Le Cras v. Hughes* is in effect over-ruled by *Routh v. Thompson*, 11 East, 428. After a proclamation by the king in council to detain and bring into port all Danish vessels, a hired armed ship of his majesty took and carried into Lisbon a Danish vessel, and sold her cargo there towards defraying in part the expenses of necessary repairs, but without the authority of a court of Admiralty, and afterwards took in a cargo on freight for England, and sailed on the 3rd November from Lisbon; on which day hostilities were declared against Denmark by another proclamation of the king in council; after which an insurance was made on the ship and freight *by order and on account of the captors*: and it was held that the captors had no insurable interest, as they could claim nothing of right, but only *ex gratiâ* of the Crown; the Dane having been seized and detained before any declaration of war against Denmark, and the captors having no claim to prize under the prize acts. Upon the question

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whether or not the captors had in that case an insurable interest, Lord Ellenborough says : " Their right in this respect has been put upon two grounds ; first, that they had a well-grounded expectation, warranted by the practice of the Crown in similar cases, that the ship and freight, had there been no loss, would have been granted to them : and, secondly, that they had the lawful possession, and were liable either to the Crown or the foreign owner for the safe custody of the vessel : and that on either of these grounds they were warranted in insuring on their own account. As to the first, it is material to see in what situation the captors stood : it is clear they had no vested right ; they could demand nothing of the Crown. Had the Crown made the grant in their favour, it would have been altogether *ex gratiâ*, a mere boon and gift. That gift might have been of the whole, or it might have been of part, and of a very inconsiderable part only. The bounty of the Crown would probably have been proportioned to the merit of the detention and capture, and the value of the prize. Had any considerable danger attended the performance of these services, the grant would probably have extended to the whole ; had there been no danger or difficulty in them, the grant would probably have been smaller : and, had it appeared that the seizure had been made upon speculation only, without any knowledge of the proclamation, there probably would have been no grant at all. At any rate, however, if there were a grant, it would be mere bounty ; and, has a man a right to indemnity because he has lost the chance of receiving a gift ? Had the ship arrived in safety, the captors would have had the chance of a grant from the Crown ; but, can they in respect of that chance insure the ship's arrival ? To what extent could they insure ? Not to the whole value, because the grant might only have been of part ; nor to any given part, because it must have been uncertain what part, if any, would have been granted. The utmost extent is the value of the chance ; and how is that

to be estimated? Independently, however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight, effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved: and, how can it be said that these captors have any interest either in this ship or freight, when the ship is altogether the king's, the freight is altogether the king's, and the captors have no interest in either, nor other concern in respect to the same, beyond a mere chance that the king may be induced to give them something out of the produce of such ship and freight?" One of the grounds upon which Lord Mansfield's judgment in *Le Cras v. Hughes* was founded, was, that it was the universal practice of the Crown to make the grant after condemnation. Speaking of that case in *Lucena v. Craufurd*, Lord Eldon says—2 N. R. 323—"If the *Omoa* Case was decided upon the expectation of a grant from the Crown, I never can give my assent to such a doctrine. That expectation, though founded upon the highest probability, was not interest, and it was equally not interest whatever might have been the chances in favour of the expectation. That which was wholly in the Crown, and which it was in the power of his majesty to give or withhold, could not belong to the captors, so as to create any right in them." Here, there is no legitimate evidence of any course of practice observed by the French Government to warrant such a degree of expectation that this bounty would be allowed, as to constitute an insurable interest.

Wilde, Serjeant, in reply—By the declaration of return (Form No. 5), the captain is merely required to state in

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what seas and for how long he has been engaged in fishing [employé à la pêche], and the aggregate amount of cargo, without distinguishing where obtained. This, coupled with the certificate of M. Senac as to the practice observed with regard to the payment of bounties, is conclusive to shew that the bounty would have been allowed in this case had the vessel arrived in safety. In *Routh v. Thompson*, there was no scintilla of interest in the captors: the prize was a droit of the Admiralty.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

This was an action brought upon a policy of assurance, which stated the insurance to be made to the amount of 800*l.*, on bounty “allowed by the French Government on the tonnage of the ship *Le Henri*, agreed to be valued at 800*l.*” The declaration alleged that the said bounty would have been allowed by the French Government upon the tonnage of the ship, if the said ship, with the cargo on board, had arrived in France; and then stated a total loss by the perils of the sea. The fourth plea, upon which the whole of the question between the parties may be considered to arise, alleges that the bounty, which is the subject-matter of the insurance, was a bounty allowed by the French Government under a certain written law of France relating to the whale fishery, which being translated is as follows:—“The vessel which shall have fished, either in the Pacific Ocean by doubling Cape Horn or by passing through the Straits of Magellan, or to the south of Cape Horn at 62 degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back in the produce of its fishing one half at least of its burthen, or if it can prove a navigation of sixteen months at least;” and the plea, after stating the course of the fishing voyage made by the ship, concludes with a traverse, “without this that the said bounty in the policy mentioned would have been allowed by the said French Government on the tonnage of

the said ship, if the said ship, with the said cargo on board, had arrived in France, as in the declaration is alleged ;” upon which traverse issue is joined.

On the part of the plaintiffs, two points have been made and argued before us—first, that, upon the proper construction of the French law, the bounty would have been payable by the Government on the arrival of the ship, under the facts stated in the case—secondly, that, if not payable upon the strict construction of the law, still, according to the usual course observed by the department of the French Government to which the administration of this law is committed, the bounty would have been in fact allowed by the French Government ; and consequently that the plaintiffs had an insurable interest in the bounty so as to satisfy the terms of the policy.

As the ship had not performed a navigation of sixteen months, the first question appears to be reduced to this single point—whether, in a case where the ship had got on board, in the produce of its fishing, more than half of her burthen before she had doubled Cape Horn, and had afterwards gone into the Pacific Ocean, the terms of the law are satisfied simply by her doubling Cape Horn and going into the Pacific Ocean with the intention of catching fish there, and attempting so to do, but taking none ; that is, in fewer words, whether it was necessary that some part at least of the produce of her fishing should be taken in the fishing latitudes pointed out by the law. And we think, upon the state of facts above given, the terms of the law are not satisfied, and that the bounty would not have become payable if the ship had arrived with her cargo, under the proper construction of the said law.

Looking at Article 2 of the law (and we cannot think that any of the documents referred to in the case throw any material light upon either side of the question), the plain natural construction of the words used in it appears to us to require that at least some part of the produce of

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her fishing which the ship brings home (and the facts of this case do not require us to decide how large a proportion) must be obtained within the fishing limits described in the law, in order to entitle her to the bounty. The language of the law is: The vessel which shall have fished [*fait la pêche*] within certain prescribed limits, and which shall bring home in the produce of her fishing, which latter words, if there is nothing besides them to give them a different meaning, naturally refer to the fishing which has just before been mentioned, that is, a fishing within the prescribed limits, not to a fishing anterior to the time when the ship had reached those limits, or subsequent to the time when she had left them. And, not only the language of the law but the object and intention of the law-maker, seems to demand this construction. The object of the Government must have been, to form a school for good seamanship, by granting a premium to the owners of vessels engaged in fishing in dangerous and tempestuous seas; and that object was expected to be accomplished, either by the ship's obtaining a certain produce by her fishing, or, in case of the want of success in fishing, then by a navigation continuing for a certain duration of time. The latter condition is sufficiently intelligible of itself; but the former, as it appears to us, is more likely to effectuate the object intended by the law, if held to imply that the produce of the fishing, either in the whole, or at least in part, must be obtained within the prescribed limits, rather than out of them. For, in the first place, the seas in which the greatest dexterity and manhood are required, are well known to be comprised within those latitudes; and, in the next place, it would defeat instead of furthering the object of the Government, if a vessel could entitle itself to the bounty, by obtaining the necessary quantity of produce from fishing in calmer seas, and, after doubling Cape Horn, and fishing ineffectually in the Pacific Ocean for some time, however short, by returning back again to France, without having

procured any portion of her cargo within the limits mentioned in the law. As well, therefore, upon the words of the law, as upon the manifest intention of it, we think the bounty would not have been claimable under the circumstances of this case, as a matter of right.

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But, admitting the bounty not to be claimable as a matter of right, under the strict interpretation of the law, it is argued on the part of the plaintiffs, in the second place, that they had such a certainty of receiving it upon the return of the ship with her produce, according to the course and practice of the Government of France in administering the bounty, that they had an insurable interest therein; on which very point a separate issue was raised by the second plea. And this argument is founded upon the cases of *Grant v. Parkinson*, Park Ins., 6th edit., 354, *Le Cras v. Hughes*, Park Ins. 358, and other cases of the same class, which were cited and relied on at the bar. It is undoubtedly true, that, in the case of *Le Cras v. Hughes*, the court expressed a decided opinion that the expectation of future benefit, founded on the contingency of a future grant from the Crown, but warranted by universal practice, did amount to an insurable interest. But, after the observations made on that case by Lord Eldon, in giving judgment in the House of Lords in *Lucena v. Craufurd*, (in error), 2 New Rep. 321, and by Lord Ellenborough in *Routh v. Thompson*, 11 East, 434, the doctrine laid down in *Le Cras v. Hughes*, if still to be treated as a binding authority, must be considered incapable of being extended, and as confined to cases falling strictly within the same circumstances. "If the *Omoa* Case," says Lord Eldon, "was decided upon the expectation of a grant from the Crown, I never can give my assent to that doctrine. That expectation, though founded upon the highest probability, was not interest; and it was equally not interest, whatever might have been the chances in favour of the expectation."

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The case, however, of *Le Cras v. Hughes* did in its cir-

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cumstances shew an expectation approaching much nearer to certain interest than the present. In that case it was stated by Lord Mansfield—"the Crown *always* makes the grant; and there is no instance to the contrary." In the case before us, the bounty referred to in the policy is stated, both in the special case itself, and also upon the fourth plea, to be the bounty allowed by the French Government under a written law, which is set out in the case and in the fourth plea. When, therefore, it is once determined that the bounty, which is so created by the written law, and by nothing else, is not, under the facts stated in the case, allowable by the legal construction of that law, it would require the most cogent and indubitable evidence of the actual and uniform allowance of the bounty under that state of facts, to induce us to hold it a bounty allowed by the Government. Looking, however, at the evidence, the certificate of M. Senac, the chief clerk in the office of the minister of Commerce at Paris for the liquidation of bounties, which is the only evidence appealed to on this point, is very short of direct and satisfactory evidence of that fact. It is in its terms negative only: the certificate states "that the Government does not make inquiry into the matter to ascertain whether the produce has been or has not been fished beyond or on this side of Cape Horn." How long the practice of making no such inquiry has existed—whether the case has ever occurred of the allowance having been made where the produce was in fact fished on this side the Cape—whether, in cases where that fact was known, the bounty has nevertheless been actually granted—or, if that fact were suspected, whether the inquiry would not be made: all these are points on which the certificate is altogether silent. It would be impossible, as it appears to us, to hold this to amount to proof, that, from the time of granting the bounty, there has been an uniform course of practice, without any exception, of allowing the bounty under the circumstances stated in the case; and, unless

such evidence is produced, the case does not fall within the rule laid down by *Le Cras v. Hughes*, and the plaintiffs cannot be held to have taken an insurable interest in the bounty.

We therefore think, notwithstanding both the points which have been taken on the part of the plaintiffs, that a *nolle prosequi* must be entered.

Judgment accordingly.

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WHITTENBURY v. LAW, one of the Public Officers of the
IMPERIAL BANK OF ENGLAND.

Wednesday,
May 13th.

THE plaintiff having recovered judgment against the defendant, who was sued as one of the public officers of the Imperial Bank of England, a joint-stock banking company carrying on business under the provisions of the statute 7 Geo. 4, c. 46, (163) in the course of the last term

The mode of proceeding under the 7 Geo. 4 c. 46, s. 13, to obtain execution against the members of a joint-stock banking com-

pany upon a judgment in an action brought against the public officer of the company for the time being, is by *scire facias*, not by suggestion.

(163) Section 4 enacts, "that, before any such corporation or co-partnership exceeding the number of six persons, in England, shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked A. to the act annexed, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or co-partnership, and also the names and places of abode of all the members of such corporation or of all the parties concerned or engaged in such co-partnership, as the same respectively shall appear on

the books of such corporation or co-partnership, and the name or firm of every bank or banks established or to be established by such corporation or co-partnership, and also the names and places of abode of two or more persons, being members of such corporation or co-partnership, and being resident in England, who shall have been appointed public officers of such corporation or co-partnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter provided, and also the name of every town and place

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obtained a rule calling upon certain persons therein named (fifteen in number) to shew cause why he should not have leave *to enter a suggestion on the roll* that they were before and at the date of the judgment, and still were, partners

where any of the bills or notes of such corporation or co-partnership shall be issued by any such corporation, or by their agent or agents; and every such account or return shall be delivered to the commissioners of stamps, at the Stamp-office in London, who shall cause the same to be filed and kept in the said Stamp-office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said commissioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of 1s. for every search."

Section 6 enacts "that a copy of any such account or return so filed or kept and registered at the Stamp-office as by the act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed with the hand-writing of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return,

and also of the fact that all persons named therein as members of such corporation or co-partnership were members thereof at the date of such account or return."

Section 9, amongst other things enacts, "that all actions or suits and proceedings, at law or in Equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such co-partnership or otherwise, against such co-partnership, shall and lawfully may be commenced, instituted, and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such co-partnership, as the nominal defendant for and on behalf of such co-partnership."

Section 11 enacts "that all and every decree or decrees, order or orders, made or pronounced in any suit or proceeding in any court of Equity against any public officer of any such co-partnership carrying on business under the provisions of this act, shall have the like effect and operation upon and against the property and funds of such co-partnership, and upon and against the persons and property of every or any member or members thereof, as if every or any such members of such co-partnership were parties members before the court to and in any such suit or proceeding; and that it shall and may be lawful for any court in which such order or

in the said company, and why execution should not be issued against them upon such judgment. The motion was founded upon affidavits disclosing the nature of the proceedings, and stating that the names of the several per-

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decree shall have been made, to cause such order and decree to be enforced against every or any member of such co-partnership, in like manner as if every member of such co-partnership were parties before such court to and in such suit or proceeding, and although all such members are not before the court."

Section 12 enacts "that all and every judgment and judgments, decree or decrees, which shall at any time after the passing of the act be had or recovered or entered up as aforesaid in any action, suit, or proceedings in law or Equity against any public officer of any such co-partnership, shall have the like effect and operation upon and against the property of such co-partnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such co-partnership; and that the bankruptcy, insolvency, or stopping payment of any such public officer for the time being of such co-partnership, in his individual character or capacity only, shall not be nor be construed to be the bankruptcy, insolvency, or stopping payment of such co-partnership; and that such co-partnership and every member thereof, and the capital, stock, and effects of such co-partnership, and the effects of every member of such co-partnership, shall in all cases, notwithstanding the bankruptcy, insolvency, or stopping payment of

any such public officer, be attached and attachable, and be in all respects liable to the lawful claims and demands of the creditor and creditors of such co-partnership, or of any member or members thereof, as if no such bankruptcy, insolvency, or stopping payment of such public officer of such co-partnership had happened or taken place."

Section 13 enacts "that execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or co-partnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of any such corporation or co-partnership; and that, in case any such execution against any member or members for the time being of any such corporation or co-partnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons who was or were a member of such corporation or co-partnership at the time when the contract or contracts, or engagement or engagements in [on] which such judgment may have been obtained was or were entered into, or became a member

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sons against whom the rule was moved, appeared, amongst others, in the return sworn by the defendant as one of the registered officers of the company, and filed at the Stamp-office in pursuance of the statute on the 1st April, 1838, a copy of which return, certified by one of the commissioners of stamps and taxes, was annexed; that all the parties were members of the copartnership at the time of the judgment; that thirteen of them had on the 14th September, 1837, executed the deed of settlement of the company, and the other two had paid calls, and that the whole of them were still members of the copartnership; and that they had been respectively duly served with the notice required by the 13th section of the statute (164).

The action was brought to recover the amount of three bills of exchange—the first for 250*l.*, dated the 19th January, 1839, drawn by one E. Bowyer upon and accepted by Melsom & Hancock, payable four months after date—the second, for 297*l.* 15*s.*, dated the 1st February, 1839, drawn by R. G. Beesley upon and accepted by Sharrocks & Birch, payable three months after date—the third, for

at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided always that *no such execution as last mentioned shall be issued without leave first granted, on motion in open court, by the court in which such judgment shall have been obtained*, and which motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership."

And section 14 enacts, "that every such public officer in whose name any such suit or action shall

have been commenced, prosecuted, or defended, and every person or persons against whom execution upon any judgment obtained or entered up as aforesaid, in any such action shall be issued as aforesaid, shall always be reimbursed and fully indemnified for all loss, damages, costs, and charges, without deduction, which any such officer or person may have incurred by reason of such execution, out of the funds of such co-partnership, or, in failure thereof, by contribution from the other members of such co-partnership, as in ordinary cases of co-partnership."

(164) Five of them, by affidavit denied that they were members at the date of the judgment.

2,500*l.*, dated the 20th March, 1839, drawn by J. Adshead upon and accepted by John Westhead, payable three months after date: all indorsed by or on behalf of the Imperial Bank of England. The writ of summons issued on the 8th July, 1839; the cause was tried at the following Lancaster Assizes, when a verdict was found for the plaintiff for 3,110*l.* 17*s.* 8*d.*; and final judgment was signed on the 22nd October.

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The rule was obtained on the authority of the case of *Bartlett v. Pentland*, 1 B. & Ad. 704, where it was held, that, wherever, by the provisions of an act of parliament, a person not a party to the record is to be affected by a judgment, or where the judgment is to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course is *to enter a suggestion on the roll*, so that the party to be affected may demur if the plaintiff do not set forth facts to bring the case within the act of parliament, or that he may traverse those facts if untrue. The motion there was made under the 5 Geo. 4, c. clx, the 1st section of which provided that all actions brought against the company (the St. Patrick's Assurance Company of Ireland) were to be prosecuted against the secretary for the time being, or against any member of the company, as the nominal defendant for them and on their behalf; by s. 4 it was provided that execution upon any judgment in such action might be issued against any member or members for the time being of the company; and by s. 8, that, in case such execution against the members for the time being should be ineffectual, the party so having obtained judgment might issue execution against any person who was a member at the time the contract was entered into upon which such action might have been brought, but no such execution to issue without *leave of the court*: and it was held that a party who had brought an action and obtained judgment against the secretary, could not lawfully issue execution against another member of the com-

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pany, without having previously, by leave of the court, suggested on the record facts to shew that the party against whom he so issued execution was liable as a member of the company.

Stephen, Serjeant, *Jervis*, *Addison*, and *Henderson*, shewed cause, in Hilary Term last, on behalf of different parties.—Entering a suggestion on the roll is not the proper mode of introducing strangers to the record. If such a course were permitted, the effect would be (the suggestion not being traversable), that the parties sought to be charged thereby would have no means, except on affidavit, of contesting their liability. This never could have been the intention of the act. In *Bartlett v. Pentland*, 1 B. & Ad. 704, Lord Tenterden founds his judgment very much upon the case of *Hickman v. Colley*, 2 Str. 1120: but that arose upon the 3 Jac. 1, c. 15, which provided, that, if one citizen of London sued another out of the jurisdiction, and did not recover 40s., he should not only lose his own costs, but should also pay to the defendant so much ordinary costs as such defendant should justly prove that it had cost him in defence of the suit; and a suggestion was obviously the only mode that could be adopted. But *Bartlett v. Pentland*, so far as it affects the present question, was expressly over-ruled by the court of Queen's Bench in the present term, in a case of *Bosanquet v. Ransford*, 3 P. & D. 298, where it was held, that, where judgment has been recovered against the public officer of a banking company, and it is thereupon sought to issue execution against any members of the company under the 7 Geo. 4, c. 46, they must be made parties to the record by scire facias. Lord Denman, C. J., delivering the judgment of the court, says: "The case of *Bartlett v. Pentland* has decided, that, where an act of parliament authorizes the making of an officer of a co-partnership the nominal defendant, but gives power to the plaintiff to take out exe-

cution against the co-partners as being the real defendants, it is necessary to obtain the authority of the court *in some way* before such execution can be had. The question is as to the mode of obtaining that authority, whether by suggestion or by scire facias; and it depends on this point — whether new parties are to be introduced upon the record. The uniform course, if new parties are introduced, is, by scire facias. Suggestion is applicable only to collateral facts affecting the same parties, as, for example, change of name, allowance or disallowance of costs under acts of parliament, and similar matters. Now, in the present case, assuming that the nominal defendant is, by the operation of the act under which he is made defendant, to be considered as the co-partnership, and that they are the real defendants, still it is left uncertain what individuals constitute that co-partnership, and the introduction of any person by name as a co-partner is in effect the introduction of a new person on the record. We think, therefore, that the proper mode of proceeding, by analogy to all former cases, is, by scire facias, and that this rule for entering a suggestion must be discharged. Therefore we admit the authority of *Bartlett v. Pentland* as to the principle, which is, that parties are not to be charged without an opportunity of contesting their liability, but differ as to the mode of proceeding by suggestion, which was not indeed the matter there in dispute." Lord Tenterden, in *Bartlett v. Pentland*, says that the suggestion may be traversed. But that is an assertion without authority; and there are distinct authorities, as well as cogent reasons to the contrary. In Viner's Abridgment, *Traverse* (P), pl. 8, it is expressly laid down that "*surmises* never shall be traversed;" citing Plowd. Com. 76. a., arguendo in *Wimbish v. Lord Willoughby*, where it is said that the only exception is the case of a suggestion in prohibition, upon the statute 2 & 3 Ed. 6, c. 18, now taken away by the statute 1 Will. 4, c. 21, s. 1, which provides "that it shall not be necessary to file

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a suggestion on any application for a writ of prohibition, but such application may be made on affidavit only:" so that, at the present time, there is no case in which a suggestion can be traversed. For the position of the court in *Bosanquet v. Ransford*, there is abundant authority. The rule is this—where, as between the *same* parties, the case assumes a new aspect, the course is to enter a suggestion; but the introduction of a new party on the record can only be effected by a scire facias. In *The Queen v. Ford*, 2 Lord Raym. 768, Ford and the other defendants were convict of deer-stealing by justices of peace, according to the 3 W. & M. c. 10; and the convictions, being removed into the King's Bench by certiorari, were there confirmed; and, after the confirmation, and before execution awarded, the person who was as well the informer as the owner of the deer, died; and his wife, being his administratrix, suggested his death upon the roll, and that she was administratrix, and upon that sued a levavi facias upon the said convictions confirmed as aforesaid, to levy the penalties: And the court held that this execution was irregular; "because in no case where the parties to the judgment are charged ought execution to be sued by any other without a scire facias." And in *Penoyer v. Brace*, 1 Lord Raym. 244, Comb. 441, 1 Salk. 319, it was likewise held that a scire facias must be brought upon a judgment to warrant an execution upon it by a stranger. *Wortley v. Rayner*, Doug. 637, affords the strongest analogy for the present argument: there, on a plea of *coverture* in an action of debt upon a judgment, a verdict was found for the defendant, and a writ of *fi. fa.* sued out for the costs, commanding the sheriff to levy and pay them to the defendant *and her husband*: and the writ and proceedings thereon were set aside for irregularity, it being a maxim that a person not a party to the record cannot be benefited nor charged by the process without a scire facias. That case tends very much to remove the only possible doubt that could occur here, viz.

that arising from the supposed privity between the defendant on the record and the parties sought to be made liable to the execution. In the ordinary case of a plaintiff becoming bankrupt after a verdict found for him and before final judgment—*Monke v. Morris*, 1 Mod. 93—there is privity, and yet the assignees can only make themselves parties to the record by scire facias (165), which, though a judicial writ, is yet in the nature of an action: Co. Litt. 29. b. Trevor, C. J., in *Arthur v. Bokenham*, 11 Mod. 150, says: “The general rule in exposition of all acts of parliament is this, that, in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law in cases of that nature; for, statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare; therefore in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had had that design, they would have expressed it in the act.” Nothing can be more convenient in a case of this sort than a scire facias, the mode of proceeding by which is well known. [The learned Serjeant here intimated that the court of Exchequer had, in a case of *Cross v. Law* (since reported 6 M. & Welsby, 217), just decided in conformity with *Bosanquet v. Ransford*: Lord Abinger saying—“We think this case is of too much importance for us to put any construction on the act of parliament by which parties who might wish to take the opinions of all the judges would be prevented from doing so. It is true these joint-stock banks place the public in a very disadvantageous position, for, it now appears that in these cases there must, or proba-

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(165) And see *Hewitt v. Mantell*, 2 Wils. 372, *Kretchman v. Beyer*, 1 T. R. 463; *Winter v. Kretchman*, 2 T. R. 45; *Waugh v. Austen*, 3 T. R. 437. If A. have

judgment in scire facias and become bankrupt, the assignee of the original judgment shall have execution without a new scire facias—*Plummer v. Lea*, 5 Mod. 88.

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bly will, be a trial of two actions instead of one: first, in order to establish the claim of the creditor against the company, &c.; and, secondly, to fix the particular individual liable to execution. However, I do not see how we can adopt any other course than that which the court of Queen's Bench, on consideration, has taken; and I think we justly may, by a very proper analogy to other cases of proceedings by scire facias, apply those proceedings to the present case. The rule is, wherever you seek to fix one party on a judgment given against another, it must be done by scire facias; and I think this is a principle which applies to the case of a public officer, who is merely the representative of the parties sought to be charged. It appears to me, and I believe that is the opinion of the court, that the construction of the 13th clause of the statute must be taken to be this—that the party who wishes to proceed upon the judgment against one of the members of the company not on the record, if he be a member at the time of the judgment and execution, would have a right to his scire facias without an application to the court; but, if the members against whom he should sue out execution should prove to be insolvent, he may then apply to the court, so as to fix the original members at the time the contract was made, and make them still liable; in that case, he must come to the court to have his scire facias.] The court called on—

Bompas, Serjeant, and *Tomlinson*, to support the rule.—The 9th section of the statute enables the co-partnership to sue and be sued in the name of their public officers, and the 11th, 12th, and 13th sections, with a view to carrying into effect the 9th, regulate the mode of making judgments against the public officers available against the members of the company or co-partnership. According to *Bosanquet v. Ransford* and *Cross v. Law*, there must in all cases be two actions. This never could have been the intention of

the legislature: it would be effectually undoing all that the 4th section had done to facilitate the discovery of the parties liable. It may be conceded that a *scire facias* is requisite where *new parties* are introduced on the record: but here there is no attempt to introduce new parties; *the partnership* are the real defendants in the name of their registered officer. [*Tindal*, C. J.—Then, you will contend that the plaintiff might sue out execution without either suggestion or *scire facias*?] Yes, provided the party charged were a member as well at the time of the contract as at the date of the judgment (166). In the case of an action on the Black Act, 9 Geo. 1, c. 22 (167), the course was to proceed against two of the inhabitants, and it was not necessary to enter a suggestion on the roll in order to have execution. [*Tindal*, C. J.—There, the action was against all the inhabitants of the hundred, and for the sake of convenience two were permitted to appear and plead—2 Wms. Saund. 378 *d*, n.] Whether or not a suggestion be traversable (and it was held to be so in a considered judgment of Bushe, C. J., in *Barton v. Hunter* (168), 1 Hudson &

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(166) This argument, which was not urged either in *Bosanquet v. Ransford* or in *Cross v. Law*, may possibly have deserved more attention than it received; for, the *intention* (however unsuccessfully expressed) of the legislature would seem pretty clear from the language of the 11th section, which affects members with decrees and orders in suits and proceedings in equity against the public officer "in like manner as if every member of such co-partnership were parties before such court to and in such suit or proceeding, and although all such members are not before the court."

(167) See 7 & 8 Geo. 4, c. 31, the first and some subsequent sec-

tions of which regulate the present course of proceedings in actions against the hundred.

(168) In this case, which arose upon the same statute as the case of *Bartlett v. Pentland*, 1 B. & Ad. 704, the plaintiff had entered a suggestion on the roll *without the leave of the court*. The 4th section of that act (5 Geo. 4, c. clx) enacted "that *execution upon any judgment* in any such action [against the secretary or any member of the company as the nominal defendant] obtained against the secretary &c., whether as plaintiff or defendant, *may be issued against any member or members for the time being* of the said company or partnership"—nothing being said as to

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Brooke, 569, and by Lord Tenterden in *Bartlett v. Penland*, 1 B. & Ad. 704), is perfectly immaterial: it may at all events be demurred to—*Hickman v. Colley*, 2 Str. 1120; *Parnell v. Wallis*, cited in *Brampton v. Crabb*, 1 Str. 47.

obtaining the leave of the court. Then came the 8th section, which provided "that, in case such execution against the member or members for the time being of the said company shall be ineffectual for obtaining payment and satisfaction for the sum or sums sought to be recovered thereby, it shall be lawful for the party or parties so having obtained judgment against the secretary or any member for the time being of the said company, to issue execution against any person or persons who was or were a member or members thereof at the time the contract or contracts was or were entered into upon which such action may have been brought: but no such execution as last mentioned shall be issued without leave of the court in which such action may have been brought, first granted."

The parties sought to be charged there were alleged to be "members for the time being." The case came before the court of King's Bench in Ireland upon a rule obtained by the defendants calling on the plaintiff to shew cause why the executions issued against them should not be set aside and why they should not be permitted to plead to the suggestion. Bushe, C. J., in delivering the judgment of the court, says: "The act not having provided any mode of authenticating the fact of any person being a member, so as to justify the

issuing of an execution against him upon a judgment obtained against another person, the plaintiffs in each of these cases have entered a suggestion on the record, alleging all the facts, and negating all the circumstances upon the existence or absence of which respectively they conceive themselves entitled to execution; i. e. they allege in those suggestions—that the persons in question were at the commencement of the suit members of the company, and their names duly enrolled as such; and that no memorial of any transfer of their shares has been enrolled—and that execution still remains to be done: and the plaintiffs pray that execution may issue against the persons named in the suggestions, pursuant to the statute. The suggestions then conclude by entering an *ideo consideratum est*, stating that "it is therefore considered by the court that the said plaintiffs should have their execution against the said A. B. for the damages and costs aforesaid." Without adverting to a statement in these suggestions, viz. that no memorial of a transfer exists, which appears to be contrary to the fact, it is enough for us to say that the suggestions allege matters of fact capable of being controverted, and upon which questions of law upon this modern statute may arise which we are all of opinion cannot properly be prejudged by this proceeding, which throws it

The statute (s. 13) makes the members for the time being primarily liable; and those who were members at the time of the contract or at the time the judgment was obtained, but who have since ceased to be so, are in the nature of sureties for those who continue members: but execution cannot issue against these last-mentioned persons after the expiration of three years next after they have ceased to be members. If, therefore, the plaintiff is compelled to proceed by *scire facias*, there may be a writ of error, and before that can be finally disposed of the three years limited for proceeding against those who have ceased to be members will have expired, and all remedy against them will be lost. In proceeding under the statute 8 & 9 Will. 3, c. 11, s. 8, for further breaches, the course was, to enter a suggestion on the roll, with a prayer of a *scire facias*: see the forms, Tidd's Appendix, 8th edit. p. 203; 3 Chit. Pl., 6th edit., p. 1197. By analogy to that practice, the suggestion may here be entered as prayed, with a nient *de-dire*, and award of execution against the parties who, having had an opportunity to do so, have not denied their liability as members of the company, and a *scire facias* against those who have.

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upon the court to assume all these disputable matters as the foundation for its judgment "that execution should issue" against a party who is a stranger to the record. What appears to us the proper rule to make, is, to set aside the execution which has issued, and also the award of execution upon the record, and leave each defendant at liberty to *traverse* or *demur* to the suggestion, as he may be advised; at the same time allowing the plaintiffs, if they think fit, to abide by the suggestions already entered, or

to alter them, or proceed in such other manner as they may deem right. However, the regular course would have been, for the plaintiffs after getting judgment against the nominal defendant (*if they thought proper to proceed by suggestion on the record*), to have applied to the court in each case (upon an affidavit stating the facts which would bring the case within the statute) for leave to enter a suggestion stating those facts, *which the defendant might controvert, by traversing it or demurring to it.*"

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TINDAL, C. J., now delivered the judgment of the court:—The plaintiff in this case having recovered judgment against the defendant, who was sued as a public officer of the Imperial Bank of England, carrying on the business of banking under the provisions of the 7 Geo. 4, c. 46, has obtained a rule calling on certain persons therein named to shew cause why he should not have leave to enter a suggestion on the roll that the several persons named in the rule were before and at the date of the judgment partners in the said company, and why execution should not be issued against them upon such judgment.

The application is founded upon the statute 7 Geo. 4., c. 46, s. 13, which provides “that execution upon any judgment in any action obtained against any public officer for the time being of any corporation or co-partnership company carrying on the business of banking under the provisions of that act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or co-partnership.”

The application is opposed upon the ground that the proper course for making the persons in question parties liable to execution on the judgment, is, not to apply for leave to enter a suggestion, but to proceed against them by *scire facias*, which is the established form of proceeding to make any new person, not a party to the judgment, chargeable to the execution—*Penoyer v. Brace*, 1 Lord Raym. 245, 1 Salk. 319; *Queen v. Ford*, 2 Lord Raym. 768, 2 Wms. Saund. 6, in notis.

In support of the application for leave to enter a suggestion, the case of *Bartlett v. Pentland*, 1 B. & Ad. 704, was relied on as being in point. In that case, judgment having been obtained against a nominal defendant, a writ of *capias ad satisfaciendum* was sued out against Sir A. B. King as a partner, without any leave having been applied for to enter a suggestion that he was a member of the company: and the court of King’s Bench held the ex-

ecution to be irregular, and discharged Sir A. B. King out of custody. It was argued by the counsel for Sir A. B. King, that the plaintiff ought to have applied for leave to enter a suggestion, to which he might, as it was said, have demurred, or traversed the facts if they were untrue; and Lord Tenterden, on delivering the judgment of the court, adopted this argument. In that case, however, the substantial question was, whether, to prevent an incongruity upon the record, the character of new parties to be made liable to the execution must not in some way be made to appear thereon; it was no matter of consideration whether it ought to be made to appear by suggestion or by scire facias.

The latter point, however, has since been fully considered, both in the court of King's Bench in the case of *Bosanquet v. Ransford*, 3 P. & D. 298, and in the court of Exchequer in the case of *Cross v. Law*, 6 M. & Welsby, 217, and in several other cases: and both courts have concurred in the opinion that the proper course of proceeding under these circumstances is, by scire facias, not by suggestion. In the opinion pronounced by those courts we agree; and are therefore of opinion that the present rule must be discharged.

Rule discharged (169).

(169) Whilst the matter was pending, several other cases similarly circumstanced were presented to the court. In none of them were the costs of the rule allowed, the

court conceiving that the plaintiffs had been somewhat misled by the case of *Bartlett v. Pentland*, 1 B. & Ad. 704.

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The statute 2 & 3 Vict. c. 29, which enacts that all executions and attachments against the lands and tenements, or goods and chattels of a bankrupt *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, is not retrospective, so as to affect the vested rights of assignees under a fiat issued before the act passed (170).

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A WRIT of fieri facias against the defendant at the suit of the plaintiff was placed in the hands of the sheriff on the 16th February, 1839, and a levy made. On the 23rd of the same month a fiat in bankruptcy issued against the defendant, under which he was duly declared a bankrupt, *and assignees were appointed*. The assignees claiming to be entitled to the goods seized, the sheriff applied to the court under the 6th section of the interpleader act. The proceeds of the levy, 60*l.* 17*s.*, were brought into court, and an issue directed, to try whether the defendant was a trader, whether there was a good petitioning-creditor's debt, and whether the defendant had committed an act of bankruptcy—the assignees being plaintiffs in the issue, and the execution-creditor, Luckin, the defendant. The issue was made up and stood for trial when the statute 2 & 3 Vict., c. 29, received the Royal assent—19th July, 1839.

That statute recites, that, by the 6 Geo. 4, c. 16, s. 82, "it was among other things enacted that all payments really and *bonâ fide made* (171) by any bankrupt or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), should be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and that all payments really and *bonâ fide made* (171) to any bankrupt before the date and issuing of the commission against such bankrupt, should be deemed

(170) It will be observed that this marginal note is inconsistent with the text, unless taken with the explanation given in the subsequent decisions to which reference is made at the end of the case.

(171) The words used in s. 82, are, "payments really and *bonâ fide made*, or which shall hereafter be made."

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valid, notwithstanding any prior act of bankruptcy committed, and that such creditor should not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not at the time of such payment to (172) such bankrupt notice of any bankruptcy committed;" and also that, by the 2 & 3 Vict., c. 11, "it is amongst other things enacted [s. 12], that all conveyances by any bankrupt *bonâ fide made and executed* before the date and issuing of the fiat against such bankrupt, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed had not at the time of such conveyance notice of any prior act of bankruptcy by him committed;" and that "it is expedient that *further* protection should be given to persons dealing with bankrupts before the issuing of any fiat against them." It then proceeds to enact "that all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide made and entered into* before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide executed or levied* before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt,

(172) "By or to," in s. 82.

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or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference."

On the second day of Michaelmas Term last—

Petersdorff, on the part of the execution-creditor, obtained a rule to shew cause why the order and rules directing the trial of the issue should not be discharged, and why the money paid into court by the sheriff as the proceeds of the levy should not be paid out to him, and why the costs of such order and rules should not abide the further order of the court. The motion was founded upon a surmise that the statute 2 & 3 Vict. c. 29, had a *general* retrospective effect: in support of which view, *Churchill v. Crease*, 5 Bing. 177, 2 M. & P. 415, and *Terrington v. Hargreaves*, 5 Bing. 489, 3 M. & P. 137, were cited.

Talfourd and *Shea*, Serjeants, on a subsequent day in the same term, shewed cause.—The ground upon which the cases of *Churchill v. Crease* and *Terrington v. Hargreaves* proceeded, was, that, unless the participle "made," in the 82nd section of the 6 Geo. 4, c. 16, were to receive a retrospective construction, the subsequent words, "or which shall *hereafter* be made," would be idle and insensible. Apart from these two decisions, the whole language of the statute now under discussion is prospective only. [*Maule*, J.—Because the prospective words found in the former statute are omitted!] The cases of *The King v. The Inhabitants of Dursley*, 3 B. & Ad. 465, and *The King v. The Inhabitants of Ruthin*, 5 B. & Ad. 215, will probably be relied on in support of the rule: but they are clearly distinguishable: in the former, the 2nd section of the statute 1 Will. 4, c. 18, was held to be *retrospective*, because otherwise it would have been wholly inoperative; and in the latter, the 1st section of the same statute was held to be *prospective only*, on the same ground, viz. that

otherwise s. 2 would have been unnecessary. Here, however, the matter rests upon the grammatical construction of a single clause: and it is a general rule in the construction of statutes, that they shall not be held to be retrospective unless so declared by express words. It would, at all events, be a strained construction to hold this enactment to operate upon rights as to which the parties are already at issue: and, if the point be doubtful, it would be unjust to decide it in a form that will prevent either party from taking the opinion of a court of error upon it (173).

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Bompas, Serjeant, and *Petersdorff*, in support of the rule.—Undoubtedly the presence of the prospective words in the 82d section of the 6 Geo. 4, c. 16 (the *absence* of which is on the present occasion, singularly enough, relied on to shew that the operation of the late act is to be prospective only,) was one ground upon which the court, in *Churchill v. Crease* and *Terrington v. Hargreaves*, held that clause to be retrospective: they tended to make the intention of the legislature more clear: but it does not follow that the court would not have arrived at the same conclusion had the prospective words been omitted. The two statutes are in *pari materiâ*; and the word “made” must receive the same construction in both. The intention of the legislature evidently was, to put all other contracts, dealings, and transactions upon the same footing as payments. And no injustice will be done by holding the act to be retrospective, and thus sustaining an honest execution against a secret act of bankruptcy. In *Elston v. Braddick*, 2 C. & M. 435, 4 Tyr. 122, the 127th section of the 6 Geo. 4, c. 16, was held to be retrospective, and to apply to discharges by bankruptcy or insolvency before the passing of the act, as well as to discharges obtained subsequently to the passing of the act. *Robertson v. Score*, 3 B. & Ad. 338,

(173) And see *Hitchcock v. Way*, 2 P. & D. 72, 6 Ad. & E. 943.

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is an authority to the same effect. In *Cunning v. Welsford*, 4 M. & P. 238, 6 Bing. 502, the proviso in s.108 of the 6 Geo. 4, c. 16, "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment *obtained* by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors," was held to be retrospective. "If," says Tindal, C.J., "the clause had been meant to apply to future judgments only, the legislature would have said, 'to be obtained,' or have used a similar expression."

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—This question comes before the court upon a rule to shew cause why a certain order and certain rules of the court, by which an issue had been directed to be tried under the interpleader act, should not be discharged, and why a sum of money paid into court should not be paid over to the plaintiff. The issue had been directed to try whether at the time of awarding the fiat in bankruptcy against Simpson, the defendant in the original action, the different requisites existed which are necessary to support the commission, in which issue the assignees of Simpson were directed to be the plaintiffs, and Luckin, the judgment-creditor, the defendant. It appears that the writ of fi. fa. of the plaintiff Luckin was put into the hands of the sheriff on the 16th February, 1839, and the fiat was not issued until the 23rd of the same month. But, whilst these orders of the court were pending, and before the trial of the issues, the statute was passed 2 & 3 Vict. c. 29, intituled, "An act for the better protection of parties dealing with persons liable to the bankrupt laws," and which received the Royal assent upon the 19th July, 1839.

That statute enacted, amongst other things, "that all executions and attachments against the lands and tene-

ments or goods and chattels of such bankrupt *bonâ fide* executed or levied before the date and issuing of the fiat, should be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed," provided there was no notice of any prior act of bankruptcy.

The application, therefore, on the part of the plaintiff in the original action, the judgment-creditor, was, that the rules which had been obtained for the trial of the issue might be altogether set aside, and the sum of 60*l.* 17*s.*, produced by the sale of the goods, and paid into court by the assignees, might be paid out to him, the plaintiff, on the alleged ground that the trial would now be altogether useless, the execution having been completed before the fiat was issued.

The whole question, therefore, between the parties, resolves itself into the single point, whether the statute 2 & 3 Vict. c. 29, is prospective only, so as to govern no executions or other transactions except such as take place after the statute was passed into a law; or whether it was retrospective also, so as to give the law to transactions which had actually taken place before the passing of the statute, whenever they were brought before the court for adjudication after the statute.

And we are of opinion, looking at the words of the statute, that it gives the law to all cases that come for adjudication before the court, where the execution was executed before the fiat in bankruptcy, whether the transaction brought before the court took place before or after the passing of the statute.

The statute recites the 82nd section of the 6 Geo. 4, c. 16, and in its mode of recital treats it as an enactment that relates to "all payments really and *bonâ fide* made by any bankrupt, or to any bankrupt;" using only the word "made" in the past tense, notwithstanding the section itself contains the expression "*really and bonâ fide made or thereafter to be made;*" the very mode of recital therefore

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appearing to afford a legislative authority, that the 82nd section comprehends within it by-gone transactions, a point which had already been decided by the courts of law: see *Churchill v. Crease*, 5 Bing. 177, 2 M. & P. 415, *Terrington v. Hargreaves*, 5 Bing. 489, 3 M. & P. 137. And the statute now under consideration continues to recite "that it is expedient that *further* protection should be given to persons dealing with bankrupts before the issuing of any fiat against them;" and then enacts in general terms, and without reference to any future time, "that all executions and attachments against the lands and tenements or goods and chattels of such bankrupt *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed," under certain conditions which do not apply to this case.

The recent statute being therefore made in *pari materia* with the former, and expressly in furtherance of the objects of the former, ought, as it appears to us, to receive the same construction as to its operation, and to be held to comprehend and govern the case before us.

We therefore think the order for the trial of the issue, which has now become useless, and the other rules dependant thereon, should be discharged, and the produce of the sale of the goods paid out of court to the judgment-creditor; but, under the peculiar circumstances of the case, without any costs on either side.

Rule absolute (174).

(174) The decision in the text has been qualified by subsequent cases. In *Edmonds v. Lawley*, 6 M. & Welsby, 285, 8 Dowl. 234, the act of bankruptcy was on the 6th of July, 1839, a *bonâ fide* execution issued on the 8th, under which the goods of the bankrupt were levied, and on the 24th, (five days after the passing of the sta-

tute), the fiat issued, under which the plaintiffs were chosen assignees; and it was held that the execution was protected by the statute. Parke, B., there says: "The words of the act are very general, none of them future, and, if taken according to their grammatical construction, will apply to all contracts, either by-gone or future.

The sound rule of construction with respect to acts of parliament, is, that the words are to be read in their ordinary and usual grammatical sense, unless that mode of construction leads to manifest inconvenience, or is repugnant to the plain intention of the legislature. If such construction would have the effect of defeating any antecedent vested right, we ought to construe the act so as to support and not to defeat it. *If, in this case, a fiat had issued, and assignees had been appointed before the passing of the act, they would have had a vested right to the property of the bankrupt from the time of the seizure, and it would have been unjust to construe the act so as to defeat that right.* Perhaps, if the assignees had not been appointed when the act passed, but the fiat had issued before, we should in that case also construe it so as not to defeat the right of the assignees. But, with respect to all fiats issued after the new act has come into operation, we think there is no injustice in saying that the assignees must take the property subject to the new law."

In *Nelstrop v. Scarisbrick*, 6 M. & Welby, 685, 8 Dowl. 746, which occurred after *Luckin v. Simpson*, it was held that the statute has a retrospective operation, so as to protect the sheriff from liability in respect of a bonâ fide execution levied on the goods of a bankrupt, without notice of the act of bankruptcy, where the seizure and sale took place and the fiat issued *before* the passing of the act, but the assignees were not appointed until *afterwards*. "Taking this act of

parliament," says Lord Abinger, "as it was construed by this court in *Edmonds v. Lawley*, and limiting its operations to the case where no right actually vested in the assignees before the passing of the act, that case is exactly in point. But I am not disposed to take so limited a view of the subject, as I go the full length of the doctrine laid down by the court of Common Pleas, in the case which has been cited as having been decided by them in this term [*Luckin v. Simpson*]. I am of opinion, that, in every case where an execution has been duly issued, and neither mala fides nor any knowledge of the fiat of bankruptcy can be shewn to have existed on the part of the execution-creditor, the transaction is protected against the bankruptcy and its consequences; and that the doctrine laid down by the court of Common Pleas is both right in law, and in accordance with the justice of the case."

But, in a later case—*Moore v. Phillips*, 9 Dowl. 294—Lord Abinger, after time taken to consult the judges of this court, said:—We are of opinion "that the act has *not* a retrospective operation, *where the title of the assignees has vested before the act passed*. *Luckin v. Simpson* certainly appears to have been a case in which the assignees were appointed before the passing of the act; but the judges of the court of Common Pleas say, that, if their attention had been particularly called to that fact, they should have considered that the vested rights of the assignees ought not to be injured by the act of parliament."

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*Wednesday,
Nov. 25th.*

The defendants, contractors employed by the commissioners of sewers, having under the direction of the commissioners obstructed a watercourse which the plaintiffs claimed a right to navigate, the latter brought an action, which was defended by the commissioners, who by their pleas denied the obstruction and also traversed the right claimed by the plaintiffs. After several abortive attempts at a reference, the commissioners applied for leave to add a plea which would furnish an answer to the plaintiffs' ground of action. The court refused to grant such leave, unless the commissioners would abide by a tender of compensation made by them before the commencement of the action in 1835.

MEDLEY and Others v. PRITCHARD and Another.

IN the year 1808, an arrangement was entered into between the then commissioners of sewers for Westminster and one John White (himself a commissioner), whereby, in consideration of his relinquishing certain freehold land to the commissioners, for the purpose of enabling them to widen the great Westminster sewer called the King's Scholars' Pond sewer at Milbank, White was permitted at his own expense to widen the sewer at the outlet into the Thames to a sufficient width for a barge to lay on his own side of the sewer. In 1831, the great increase of building in the district requiring increased facilities of drainage, the commissioners entered into a contract with the defendants for further widening the sewer. The construction of the necessary sluices and flood-gates preventing the plaintiffs (who were the trustees of the Equitable Gas Light Company, to whom the interest of White in the premises abutting on the sewer at the spot in question had been conveyed,) from navigating the lower part of the sewer according to the arrangement made by the commissioners with White in the year 1808, proceedings were threatened, and communications took place between the respective solicitors of the plaintiffs and the commissioners, the plaintiffs claiming compensation to the amount of 5,827*l.* for the obstruction.

On the 3rd April, 1835, the commissioners, through their solicitors, offered the plaintiffs 1696*l.* 13*s.* 1*d.* as a compensation for the injuries complained of. This offer was rejected.

This action was commenced on the 28th May, 1835. The declaration was delivered on the 5th June, on the 25th the defendants pleaded not guilty and five special pleas denying the right of the plaintiffs as stated in the declaration, and issue was joined on or about the 7th July.

On the 3rd August in the same year, an order was made by Alderson, J., by consent—that a special case should be stated for the opinion of the court; that it should be referred to a barrister to settle such special case if the parties differed about the same; and that, after the question of law to be raised by such case should have been decided, and in case the parties should disagree as to the amount of compensation to be paid by the defendants, it should be referred to the said barrister to ascertain and award the amount of such compensation.

In March, 1836, application was made by the defendants to Patteson, J., for leave to add a plea of justification under the statutes of sewers, and a plea of justification by virtue of a certain commission of sewers of his late majesty King George the Third; but that learned judge made no order, it appearing to him that the matters in difference had been left by mutual consent to the decision and award of the arbitrator, and it not appearing that he was unable to proceed under the order of reference.

A case settled pursuant to the order of Alderson, J., came on for argument in this court in Trinity Term, 1837: but it was found not sufficiently to raise the question between the parties, and no opinion was pronounced upon it, the respective counsel undertaking to make the necessary alterations. Delays and difficulties presenting themselves in the settlement of the case, and attempts at referring the matters in difference proving abortive, the commissioners (by whom the action was defended) conceiving such a course to be inconsistent with their duty—

Wilde, Serjeant, on behalf of the defendants, in Easter Term, 1839, obtained a rule nisi to rescind the order of Alderson, J., of the 3rd August, 1835, and that the defendants might be at liberty to amend their pleas by pleading that the matters complained of were done by order and under the authority of the commissioners of sewers.

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Sir F. Pollock and Butt, in Michaelmas Term following, shewed cause.—They submitted that the application was in breach of good faith, and that the defendants ought not to be permitted, especially after so great a lapse of time, to evade the compact they had entered into, and set up an entirely new defence that would have the effect of defeating the plaintiffs; and they referred to *Cox v. Roll*, 2 Wils. 253, where the court refused to permit the defendant to add a plea of the statute of limitations; and *Jenkins v. Creech*, 5 Dowl. 293, and *M'Dowall v. Lyster*, 2 M. & W. 52, [probably the same case], where, in an action on a banker's cheque, the defendant having pleaded a plea admitting the making of the cheque, the court refused to permit him to add a plea that the cheque was not made pursuant to the provisions of the stamp act.

Wilde, Serjeant, and *Ogle*, in support of the rule.—The object of the motion is not to raise a mere formal or inequitable defence, but that the real question intended to be put in issue between the parties may be tried. There is nothing in any of the communications between the parties to shew that the commissioners intended to deprive themselves of any legal defence. They merely seek to get rid of a bargain which they allege their predecessors were by undue influence induced to enter into with one of their own body.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court: The application made by the defendants to amend their pleas, by the introduction of a new plea which would furnish an answer to the plaintiffs' ground of action, after so long an interval since the pleas were put upon the record, is an application to the discretion of the court; and ought not to be acceded to by the court, unless the equitable consideration of the whole case as it stands between the parties calls for such determination. Now, it appears by the

affidavit of Mr. Hodgson, that, on the 3rd April, 1835, a tender of the sum of 1696*l.* 13*s.* 1*d.* was made by the commissioners as a compensation for the injuries sustained by the plaintiffs in consequence of the alteration of the sewer; which tender was declined by the plaintiffs; and it appears further, that this action was brought against the contractors, by arrangement with the commissioners of sewers, for the mere purpose of trying the plaintiffs' right to a *larger* compensation. On the part of the commissioners, it is alleged, that, such tender having been refused, they are entitled to any defence they might originally have had to the plaintiffs' right to recover any compensation whatever; and that, in the arrangement for bringing the action, and submitting its decision under a special case and reference, they never intended to waive any legal defence they might have. But we think the pleas put upon the record by the solicitors of the commissioners, who conduct the case for the defendants, appear to support the view taken of the arrangement by the plaintiffs.

But facts are stated in the affidavits on the part of the commissioners from which an argument was raised and strongly insisted on before us, that there had been some imposition practised on the commissioners of sewers for the time being with reference to the original arrangement in 1808. But, admitting such dealing to have taken place, there is not the slightest ground to surmise that the present plaintiffs had any share in it whatever, who claim as purchasers from the former owner of whom mention is made in the argument. And we think it would be unjust to the plaintiffs that their rights to the ordinary course of proceeding in this action should be affected on the present point by the wrongful acts, if such there were, of their predecessors.

Taking all the circumstances into consideration, it appears to us to be reasonable and equitable, on the one hand, that the commissioners should not be entitled to the

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 motion.

favour they ask of the court, unless they are ready to abide by the tender made by them before the action was brought: and we therefore think, if the commissioners refuse to abide by the terms proposed by themselves, so much of the rule as seeks to discharge the order of Mr. Baron Alderson should be made absolute, and the rest discharged, and the commissioners should be held to try the cause on the pleadings as they now stand. But, if, on the other hand, the commissioners are now willing to abide by their original offer, and the plaintiffs decline to accept it, then the defendants should be allowed to amend their pleas, by the introduction of the new plea, and the rule made absolute. And we think, as the parties throughout the early stage of the proceedings appear to have been endeavouring to carry into effect an arrangement which has at last proved abortive without blame on either side, there should be no costs of this motion on either side.

*Wednesday,
 June 17th.*

A demand of a highway-rate by one of two surveyors, acting under the 5 & 6 Will. 4, c. 50, is a valid demand.

A rated inhabitant of the district or parish for which the rate is made is a competent witness to support it.

MORRELL v. MARTIN.

THIS was an action of replevin. The declaration charged the taking by the defendant of two stacks of wheat of the plaintiff, on the 28th February, 1837, at the parish of Hawkhurst, in the county of Kent, in a close there called the Farm-yard.

The defendant pleaded non cepit, and made cognizance as constable of the parish of Hawkhurst, acting under and by virtue of a certain warrant of distress thereafter mentioned, because, before and at the time of the making of the rate or assessment thereafter next mentioned, and thence until and at the said time when &c. in the declaration mentioned, one Thomas Ayerst and one Thomas Mercer Durrant were surveyors of the highways in and for the said parish of Hawkhurst (the same parish maintain-

ing its own highways), acting in pursuance and in the execution of the statute 5 & 6 Will. 4, c. 50; that, before and at the time of the making of the rate and assessment thereinafter mentioned, and thence until and at the time of the commencement of the suit, the plaintiff was and had been the occupier of certain property which before and at the time of the passing of the said act of parliament and thence hitherto was and had been and still was, and the occupier whereof during all the time aforesaid in respect of the same was and had been and still was, liable to be rated and assessed to the relief of the poor within the said parish of Hawkhurst, and which said property, or the owner or occupier thereof in respect of the same, had not previously to the passing of the said act of parliament been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof or of the highway-rate, to wit, certain tithes, lands, and tenements within the said parish, of great annual value, to wit, of the full annual value of 1224*l.* 10*s.*, and the plaintiff by reason thereof was liable to be rated and assessed to and in the said rate and assessment, and in manner thereinafter mentioned: that, after the passing of the said act of parliament, and after the 20th March, 1836, in the said act mentioned, and whilst the said T. Ayerst and T. M. Durrant were and continued to be such surveyors as aforesaid, and during the year in and for which they were such surveyors as aforesaid, that is to say, the year from the 31st March, 1836, until the first meeting in vestry of the inhabitants of the said parish of Hawkhurst in the then next year for the nomination of overseers of the poor of the said parish, according to the true intent and meaning of the said act of parliament, and whilst the said property of the plaintiff, and the plaintiff in respect thereof, were so liable to be rated as aforesaid, to wit, on the 1st July, 1836 aforesaid, by a certain rate or assessment then made and signed by the said T. Ayerst and T. M. Durrant as such surveyors

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as aforesaid, in order to raise money for carrying the several purposes of the said act of parliament into execution, to wit, for the repair of the highways within the said parish of Hawkhurst, that is to say, a certain equal rate or assessment made at and after the rate thereafter mentioned upon all property within the said parish which at the time of the passing of the said act of parliament was liable to be rated and assessed to the relief of the poor within the said parish of Hawkhurst, and also upon all such woods, mines, and quarries of stone and other hereditaments within the said parish as before the time of the passing of the said act of parliament had been usually rated to the highways within the said parish, and upon the respective occupiers of the property aforesaid not being property which or the owner or occupier whereof previously to and at the time of the passing of the same act of parliament had been or was legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or highway-rate, and containing and specifying the names of all the respective occupiers of the said premises and property so rated and assessed as aforesaid, and also a description of the same premises and property and of the respective portions thereof occupied by each of such occupiers respectively, and the full annual value of such portions, and the sum in the pound of and upon the full annual value of the premises and property so rated and assessed as aforesaid at and for which the same rate or assessment was made, to wit, the sum of 10*d.* in the pound of and upon such annual value, and the sums and amounts rated and assessed at and after the said rate in the pound of the full annual value last aforesaid upon the same portions respectively, and upon the respective occupiers thereof in respect of the same, and the full annual value of the whole of the said premises and property so rated and assessed as aforesaid, and also the sum rated or assessed upon the same premises and property and the occupiers thereof, after the

rate in the pound in the said assessment mentioned, a certain large sum of money, to wit, the sum of 51*l.* 0*s.* 5*d.*, being and in the said rate mentioned to be at and after the rate of 10*d.* in the pound of and upon the full annual value of the said property which and in respect whereof the plaintiff was so liable to be rated, to wit, the said tithes, lands, and tenements firstly thereinbefore mentioned, was rated and assessed upon the said property of the plaintiff, and upon the plaintiff in respect thereof: that the said rate or assessment was therein mentioned to be and was in fact made at and after the rate, and did not exceed the sum of 10*d.* in the pound of or upon the full annual value of the premises and property rated and assessed by the said rate or assessment, and was also therein mentioned to be and in fact was the first rate or assessment made in pursuance or under the authority of the said act of parliament, or for the amending and supporting of the highways within the said parish, in the year in and for which the said T. Ayerst and T. M. Durrant were such surveyors as aforesaid, and in which the said rate or assessment was so made as aforesaid: that, in the said rate or assessment was stated and contained the name of the plaintiff as such occupier as aforesaid, and the description of the said property of the plaintiff so rated as aforesaid, and in respect whereof his name was so stated in the said rate as such occupier as last aforesaid, and also the full annual value of the same, to wit, the said sum of 1224*l.* 10*s.*, together with the sum in the pound of or upon such full annual value as and for which the said rate or assessment was so made as aforesaid, to wit, the said sum of 10*d.* in the pound of such full annual value, and also the said sum which had been and was thereby rated and assessed, at and after the rate last aforesaid, upon the said property of the plaintiff and upon the plaintiff in respect thereof as aforesaid, to wit, the said sum of 51*l.* 0*s.* 5*d.*: that afterwards, and before the said sum of money so rated and

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Demand.

Complaint.

assessed upon the said property of the plaintiff, and upon the plaintiff in respect thereof as aforesaid, had been demanded of the plaintiff as thereafter mentioned, and whilst the said T. Ayerst and T. M. Durrant were such surveyors as aforesaid, to wit, on the 7th July, in the said year 1836, the same rate or assessment was duly consented to and allowed by &c. &c., two of the justices of the peace of his said late majesty King William the Fourth for the county of Kent, residing within and acting in and for the division in which the said parish of Hawkhurst is situate, to wit, the lower division of the lath of Scray in the county aforesaid, and one of the said justices, to wit, &c., then also being of the quorum : that the said T. Ayerst and T. M. Durrant, so being such surveyors as aforesaid, afterwards, and on the Sunday next after the allowance of the said rate or assessment, to wit, on the 10th July, in the year last aforesaid, caused public notice to be given of the said rate or assessment, and of the same having been so allowed by the said justices as aforesaid, at the church of the said parish of Hawkhurst ; and the same rate or assessment was then and there duly published according to the true intent and meaning of the said act of parliament ; of all which said several premises the plaintiff afterwards, to wit, on &c. last aforesaid, had notice : that, although payment of the last-mentioned sum of money, to wit, 51*l.* 0*s.* 5*d.*, so rated and assessed upon the plaintiff and his said property as aforesaid, was afterwards and before the making of the information or the granting of the summons thereafter next mentioned, to wit, on the 18th December, 1836, aforesaid, demanded of the plaintiff, to wit, *by the said T. M. Durrant, so being such surveyor of the highways as aforesaid*, and the plaintiff was then required to pay the same ; yet the plaintiff did then wholly neglect and refuse to pay the same sum, or any part thereof, and had hitherto wholly neglected and refused so to do ; whereupon, and by reason of such refusal and neglect of the plaintiff to

pay the said last-mentioned sum of money as aforesaid, and the same and every part thereof being and remaining wholly unpaid and unsatisfied, *the said T. M. Durrant, so being such surveyor as aforesaid*, afterwards, to wit, on the 5th January, 1887, made complaint and gave information upon oath to and before T. L. H., Esq., then being one of the justices of the peace of his said late majesty in and for the said county of Kent, and residing within and acting for the said district of the lower division of the lath of Scray, in the said county, that the plaintiff had neglected and refused to pay the said sum of 5*l.* 0*s.* 5*d.*, after demand thereof made, and had not then paid the same, contrary to the statute made in that behalf: that thereupon the said last-mentioned justice afterwards, to wit, on the day and year last aforesaid, by his summons in writing under his hand and seal, after reciting that complaint and information had been made upon oath before him by *the surveyor* of the highways for the said parish of Hawkhurst, and that by a certain rate or assessment duly made, allowed, and published according to the statutes in that case made and provided, the sum of 5*l.* 0*s.* 5*d.* was duly rated and assessed upon him the plaintiff for and towards the amending, repairing, and supporting the highways within the said parish, and that the plaintiff had refused and neglected to pay the same after demand thereof made, and had not then paid the same, required the plaintiff personally to appear before such of his said late majesty's justices of the peace as should be present at &c., there to answer to the said complaint and information, and shew cause why the said sum should not be levied on the plaintiff's goods and chattels, pursuant to the statutes in that case made and provided: that a duplicate of the said summons was afterwards, and a reasonable and convenient time before the said 2nd February in the year last aforesaid, to wit, on the 20th January in the year last aforesaid, delivered to the plain-

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Service.

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Default.

tiff and served personally upon him the plaintiff, and that afterwards, to wit, on the said 2nd February, in the year last aforesaid, to wit, at &c., at a petty sessions duly holden by and before one C. T. P., Esq., and one T. M., Esq., then also being justices of the peace of his said late majesty for the said county, residing within and acting for the said district of the lower division of the lath of Scray in the same county, the last-mentioned justices being then and there present, the plaintiff was then and there called to appear before them the last-mentioned justices; yet the plaintiff did not then and there appear, but made default, nor was any sufficient cause shewn to the last-mentioned justices why the last-mentioned sum of money should not be paid by the plaintiff; that the said T. M. Durrant, so being such surveyor as aforesaid, was present at the time and place last aforesaid, and having then and there appeared before the last-mentioned justices, then upon oath deposed to and before the same justices (and to whom the said rate or assessment was then produced), that, in and by a certain rate or assessment made, assessed, allowed, and published according to the statute in that case made and provided, bearing date &c., to wit, being the said rate or assessment in this cognizance before mentioned, the plaintiff, an occupier of tithes, lands, and tenements in the said parish of Hawkhurst, was duly rated and assessed for and towards the necessary repair of the highways of the said parish, in the said sum of 51*l.* 0*s.* 5*d.*, that is to say, in manner in this cognizance before mentioned, and that the said sum had been lawfully demanded of the plaintiff, and that he the plaintiff had refused and did then refuse to pay the same; that one T. P., being then also present before the last-mentioned justices, at the place aforesaid, then also deposed upon oath to and before the same justices, that, on the said 20th January then last, he the said T. P. delivered a duplicate of the summons aforesaid to the plaintiff person-

ally as thereinbefore mentioned; that thereupon the said C. T. P. and T. M., so being such justices as aforesaid, to wit, on the day and year last aforesaid, duly made their certain warrant in writing under their hands and seals respectively, and directed the same to the *surveyors* of the highways of the parish of Hawkhurst in the said county, and to the constable of the said parish aiding and assisting therein, and, after reciting in their said warrant, that, in and by a rate and assessment made, assessed, allowed, and published according to the statute in that case made and provided, bearing date the 1st July, 1836, being the rate and assessment thereinbefore mentioned, the plaintiff, an occupier of tithes, lands, and tenements in the said parish of Hawkhurst, was duly rated and assessed for and towards the necessary repair of the highways of the said parish in the sum of 5*l.* 0*s.* 5*d.*, as was thereinbefore mentioned, and that it duly appeared unto them the said justices, as well upon the oath of the said T. M. Durrant, *one of the said surveyors of the highways of the said parish*, as otherwise, that the said sum had been lawfully demanded by *him* the said T. M. Durrant, but that the plaintiff had refused and did refuse to pay the same, and that it also appeared unto the said justices that the plaintiff had been duly summoned to shew cause why he refused to pay the said rate and assessment, and that the plaintiff had not appeared according to such summons, and had not shewn the said justices a sufficient cause why the same should not be paid, the said last-mentioned justices did require them the said persons to whom the said warrant was so directed in manner aforesaid forthwith to make distress of the goods and chattels of the plaintiff, and that if within the space of five days next after such distress by them taken the said sum of 5*l.* 0*s.* 5*d.*, together with the reasonable charges of taking and keeping the said distress, should not be paid, that then they the said last-mentioned persons should sell the said goods and chattels so by them

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distress.

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Objection to the
 competency of
 Durrant.

learned judge over-ruled these objections, but reserved to the defendant leave to move to enter a nonsuit should such a course become necessary.

In support of the cognizance, the defendant called Durrant, one of the surveyors of the highways for the parish of Hawkhurst, by whom the rate in question was made. He was objected to on the part of the plaintiff as incompetent; and it was insisted that his competency was not restored (as was at first contended on the other side) by the 100th section of the 5 & 6 Will. 4, c. 50 (178), that clause only applying to proceedings for offences against the act.

On the part of the defendant it was submitted, that, as-

which such action or suit shall be so brought; and every such action shall be brought, laid, and tried where the cause of action shall have arisen, and not in any other county or place; and the defendant in such action or suit may plead the general issue, and give this act and every special matter in evidence at any trial which shall be had thereupon; and, if the matter or thing shall appear to have been done under or by virtue of this act, or if it shall appear that such action or suit was brought before twenty-one days' notice thereof given as aforesaid, or that sufficient satisfaction was made or tendered as aforesaid, or if any action or suit shall not be commenced within the time before limited, or shall be laid in any other county than as aforesaid, then the jury shall find a verdict for the defendant therein; and if a verdict shall be found for such defendant, or if the plaintiff in such action or suit shall become nonsuit, or suffer a discontinuance of such action, or if, upon any demurrer in such ac-

tion, judgment shall be given for the defendant therein, then and in any of the cases aforesaid such defendant shall have costs as between attorney and client, and shall have such remedy for recovering the same as any defendant may have for his or her costs in any other case by law."

(178) Which enacts "that no person shall be deemed incompetent to give evidence or be disqualified from giving testimony or evidence in any action, suit, prosecution, or other legal proceedings to be brought or had in any court of law or equity, or before any justice or justices of the peace, under or by virtue of this act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer appointed by virtue of this act, nor shall such testimony or evidence for any of the reasons aforesaid be rejected or liable to be questioned or set aside."

suming the 5 & 6 Will. 4, c. 50, s. 100, not to apply to a case like the present, the witness was at all events made competent by the 9th section of the 54 Geo. 3, c. 170 (179). Of this opinion was the learned judge, and accordingly the objection was disallowed, leave being reserved to the plaintiff to move to enter a verdict for 4*l.* 4*s.*, if the court should be of opinion that the witness was not competent.

A further objection to the competency of Durrant—that he as an inhabitant of the parish was liable to the attorney employed by them for the costs of the action—was removed by a release.

The evidence of Durrant gave rise to the following objection on the part of the plaintiff:—It appeared that Ayerst and Durrant were appointed surveyors of the parish of Hawkhurst, and that the demand of the rate in question was made by Durrant alone, and the warrant granted upon his information and complaint only. This, it was contended, was insufficient, the two surveyors constituting but one officer.

The learned judge took a note of the point; and a verdict was, under his direction, entered for the defendant on the second issue, and for the plaintiff on non cepit.

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As to the sufficiency of the demand.

(179) Which enacts "That no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, &c., or wholly or in part supported thereby, or executing or holding any office thereof or therein, shall, before any court or person or persons whatsoever, be deemed to be by reason thereof an incompetent witness for or against such district, parish, &c., in any matter relating to such rates or cesses, or to the boundary between such district, parish, &c., and any adjoining district, parish, &c., or to any order of removal to or from

such district, parish, &c., or the settlement of any pauper in such district, parish, &c., or touching any bastards chargeable or likely to become chargeable to such district, parish, &c., or the recovery of any sum or sums for the charges of maintenance of such bastards, or the election or appointment of any officer or officers, or the allowance of the accounts of any officer or officers of any such district, parish, &c., any law, usage, statute, or custom to the contrary in anywise notwithstanding."

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Thesiger, in Michaelmas Term, 1838, moved for a rule nisi to enter the verdict on the second issue for the plaintiff, pursuant to the leave reserved to him.—Upon the first point made by him at the trial, he referred to *Oxenden v. Palmer*, 1 B. & Ad. 236, where it was held that a person who pays highway-rate within a parish is not rendered a competent witness by the 54 Geo. 3, c. 170, s. 9, upon the trial of an issue whether within that parish there is a custom that all persons residing therein, whose duty it is to cause the highways within the parish to be repaired, may take shingle from the sea-beach for the purpose of such repair; the custom not being a matter relating to rates or cesses within the meaning of the act: and also to *The King v. The Inhabitants of Bishop Auckland*, 1 Ad. & E. 744, where it was held that the rated inhabitants of a district indicted for non-repair of a highway are not rendered competent witnesses for the defence by the statute (180). And upon the second he argued that the appointment of the surveyors under the 5 & 6 Will. 4, c. 50, s. 6 (181), was a joint appointment of two persons to fill the office of surveyor, the two individuals constituting but one officer; and, consequently, that a demand and information by one alone was not sufficient—like a warrant or a return by one of the two individuals who execute the office of sheriff of Middlesex, or an assignment of the prisoners at the close of the shrievalty by one of them only.

(180) See *Doe d. Bachelor v. Bowles*, 3 N. & P. 632, 8 Ad. & E. 502, where Lord Denman says:—“On consideration we cannot agree with *Oxenden v. Palmer* and the decisions to which it has given birth.” And see *Doe d. Boulton v. Adderley*, 3 N. & P. 629, 8 Ad. & E. 502.

(181) Which enacts “That the inhabitants of every parish maintaining its own highways, at their

first meeting in vestry for the nomination of overseers of the poor in every year, shall proceed to the election of *one or more persons* to fill the office of surveyor in the said parish for the year next ensuing, &c. &c.; which surveyor shall repair and keep in repair the several highways in the said parish for which he is appointed, and which are now or hereafter may become liable to be repaired by the said parish.”

A rule nisi was granted, with liberty to the defendant, on shewing cause, to rely on any of the objections upon which leave to move was reserved to him at the trial.

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Platt and Channell, in Trinity Term last, shewed cause against the rule obtained by *Thesiger*.—1. It may be that the one could do no act without the assent express or implied of the other: but it would be absurd to hold that every act done in execution of the office of surveyor must be the physical act of both the individuals who fill the office: the whole object of appointing two surveyors would thus be frustrated (182).

1. Demand by
Durrant suffi-
cient.

2. Durrant, the surveyor, was rendered a competent witness, if not by the 100th section of the 5 & 6 Will. 4, c. 50, at all events by the 9th section of the 54 Geo. 3, c. 170. The cases of *Oxenden v. Palmer* and *The King v. The Inhabitants of Bishop Auckland* were decided upon the ground that the question then before the court did not properly and strictly relate to rates or cesses of the parish within the meaning of the statute. Here, however, the matter clearly does relate to the rates or cesses of the parish within the meaning of the 54 Geo. 3, c. 170, s. 9.

2. Durrant a
competent wit-
ness.

Wilde, Serjeant, and *Ogle*, in support of the rule.—

1. The office of surveyor is indivisible, though the exigencies of the parish may require it to be filled by a plurality of persons. By the 57th section of the general turnpike-act, 3 Geo. 4, c. 124, it is enacted that all contracts signed by the trustees for the letting of tolls, or by their clerk or treasurer, shall be valid, although not by deed or under seal; and by the 74th section the trustees may sue and be sued in the name of their clerk or clerks for the

1. Demand, &c.
insufficient.

(182) It was also contended that the motion was incorrect in point of form, this objection appearing on the face of the record, and there-

fore being properly a ground for moving for judgment non obstante veredicto.

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time being. The trustees of a turnpike-road having appointed *two* persons to act as clerks—it was held (*Bell v. Nixon*, 2 M. & Scott, 534, 9 Bing. 393) that a contract for letting tolls signed by *one* only was not sufficient. In the course of the argument in that case reference is made to *Salter v. Grosvenor*, 8 Mod. 304, Viner's Abridgment, *Officer and Offices* (C. 3), pl. 1, Bacon's Abridgment, *Offices and Officers* (K.), *Arris v. Stukely*, 2 Mod. 260, and *Jones v. Pugh*, 2 Salk. 465, to shew, that, where an office, such as that of sheriff, bailiff, &c., is granted to two, and one dies, the other cannot act. Though the act need not in all cases be done by the two individuals, it must at all events be done in the name of both. In *Hendebourck v. Langton*, 3 C. & P. 566, it was held that a succeeding surveyor cannot sue two persons jointly appointed to the office, in respect of money which came to the hands of one of them alone. The office is one that is not ministerial only: many of the acts to be done by the surveyor call for the exercise of discretion and judgment: the parishioners are not, where two are appointed, to be bound by the act of one. The evidence, therefore, of a demand made personally and orally by *one* of the surveyors, clearly did not sustain the allegation in the cognizance that the rate was demanded, which, of course, can only have reference to a *legal* demand.

2. As to the ad-
 missibility of
 Durrant.

2. The competency of Durrant was not restored by the 100th section of the 5 & 6 Will. 4, c. 50. That section only removed the objection arising from the fact of his being a surveyor. It could not have escaped the legislature or the framer of the act, that there were proceedings before magistrates under the act other than those relating to offences committed against the act. Nor does the 9th section of the 54 Geo. 3, c. 176, at all help the case: that applies only to those rates or cesses that are strictly parochial rates, and not to the highway-rate.

At the sittings in Banc after Trinity Term, the argument was resumed upon the points made on the trial on the part of the defendant.

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Ogle, for the plaintiff.—1. It is undoubtedly established by a variety of cases that replevin will not lie for a distress in the nature of an execution: see *Rex v. Burchett*, 1 Str. 567; *Pearson v. Roberts*, Willes, 672, and the cases in the note thereto. But, by s. 34 of the 5 & 6 Will. 4, c. 50, which enacts, “that, for levying and recovering the said rate [the highway-rate] by this act authorized to be made, the surveyor shall have the same powers, remedies, and privileges as the overseers of the poor in the parish have by law for the recovery of any rate made for the relief of the poor,” the highway-rate is for all purposes of collection placed upon the same footing as the poor-rate: and that a distress for a poor-rate may be replevied, is clear—*Milward v. Caffin*, 2 W. Blac. 1330, and the authorities there cited; *Selby v. Bardons*, 3 B. & Ad. 2; *Sabourin v. Marshall*, 3 B. & Ad. 440 (183). The 34th section of the highway act virtually incorporates the 19th section of the 43 Eliz. c. 2; as to which Lord Tenterden, in *Sabourin v. Marshall*, says: “The statute 43 Eliz. c. 2, gives the power of levying poor-rates by distress and sale; and section 19 by implication gives the power to replevy for goods unlawfully distrained; for, it enacts, that, in an action brought for taking any distress for a poor-rate, the defendant may make avowry or cognizance. The legislature must be understood from that section to have intended that the party whose goods were unlawfully taken might replevy by any mode then known to the law; for,

1. Replevin lies
on a distress for
a highway-rate.

(183) See *Marshall v. Pitman*, 2 M. & Scott, 745, 9 Bing. 595. There, an apothecary, being an inhabitant, was rated in respect of his stock in trade: and the court held,

that, *being liable to be rated as an inhabitant*, his mode of impeaching the validity of the rate was by an appeal to the sessions, not by replevin.

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2. Demand of
perusal and
copy not neces-
sary.

the remedy is not confined expressly to replevin by writ, and replevin by plaint is more simple and less expensive."

2. No demand is necessary in any case where the magistrate who granted the warrant would not be liable—*Kay v. Grace* (or *Grover*), 5 M. & P. 140, 7 Bing. 312; *Sturch v. Clarke*, 4 B. & Ad. 113, 1 N. & M. 671: and see *Whitley v. Roberts*, M'Clel. & Y. 107. In the present case clearly no action would lie against the magistrate, who had no knowledge or means of knowledge of any irregularity in the demand of the rate or otherwise. And in *Fletcher v. Wilkins*, 6 East, 283 (which is recognized in *Waterhouse v. Keen*, 4 B. & C. 200, 6 D. & R. 257), it was expressly held that replevin is not an action within the 24 Geo. 2, c. 44, s. 6. To hold a demand of the perusal and copy necessary would in effect be altogether to abolish the remedy by replevin in a case of this sort.

3. Replevin not
within s. 109.

3. The 109th section of the statute, which requires twenty-one days' notice of action "for anything done in pursuance of or under the authority of the act," does not apply to replevin. The seizure having been made, the plaintiff, before the goods are removed, applies to the under-sheriff for a replevin, and gives bond to appear at the *next* county court: the plaint there levied is the commencement of the action. If the statute were to apply to replevins, it would in many cases be impossible to comply with the condition of the bond. [*Bosanquet, J.*—The condition of the bond is, to *prosecute* the suit. *Coltman, J.*—The *statute* (184) does not require the plaint to be levied at the *next* county court]. *Fletcher v. Wilkins* is also an authority to shew that this objection is not well founded. Replevin is a proceeding in rem, not an action for damages; and clearly it is not an action for anything done

(184) 11 Geo. 2, c. 19, s. 23, which requires the bond to be taken, provides that it shall be conditioned "for prosecuting the suit with effect

and without delay, and for duly returning the goods and chattels distrained in case a return shall be awarded."

"in pursuance of or under the authority of the act." Section 109 goes on to provide for a tender of satisfaction: that cannot apply to replevin; the plaintiff has received satisfaction before the plaint is levied. The clause likewise clearly has reference to transitory actions only: replevin is local—*Potter v. North*, 1 Wms. Saund. 347, in notis.

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Non cepit is not the general issue in replevin, so as to enable the party to give the special matter in evidence. It does not put in issue the property of the plaintiff, but only the fact of the taking.

Non cepit not
the general is-
sue in replevin.

Platt, and Channell, Serjeant, contra.—1. A distress taken under this act is not replevisable. The 105th section, which gives a right of appeal, would as well as the 109th be altogether unnecessary if the 34th section would bear the construction contended for on the other side. If aggrieved by the rate or by the decision of the magistrate, the plaintiff here might have appealed.

1. Distress un-
der the statute
not replevisa-
ble.

2. Replevin is beyond all doubt an action: and it is equally clear that this is an action brought for a thing done in obedience to the warrant of a justice of the peace. If the case be not within the statute, a constable never can safely levy a highway-rate: the slightest excess of jurisdiction on the part of the magistrate will entitle the party to recover damages (and there is no reason why substantial damages may not be recovered in replevin), although the constable may have obeyed the warrant to the letter. The court will be slow to lay down a doctrine so mischievous. [*Tindal*, C. J.—I cannot resist the authority of *Fletcher v. Wilkins*, 6 East, 283.]

2. Case within
the 24 Geo. 2,
c. 44, s. 6.

3. If the action of replevin be not within the 109th section of the 5 & 6 Will. 4, c. 50, there is no case of a proceeding for the recovery of a highway-rate that may not be excluded from it. The condition of the replevin-bond is, to prosecute the suit at the next county court: that

3. Replevin
within s. 109.

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Non cepit the
general issue,

must be understood to mean, at the next practicable county court—*The King v. The Justices of Essex*, 1 B. & Ald. 210. If the next county court were within twenty-one days, the form of the condition might be varied: the statute does not require the prosecution to be at the next county court, but merely "with effect and without delay."

In Comyns's Digest, *Pleader* (3 K. 12.), non cepit is emphatically called the general issue. In Tidd's Practice, 9th edit. 645, non cepit is also called the general issue in replevin. So, in Chitty on Pleading, 6th edit., Vol. 1, p. 499, it is said: "The plea in denial in replevin is non cepit modo et formâ, by which the defendant put in issue, not only the taking, but also the taking in the place mentioned in the declaration—*Johnson v. Wollyer*, 1 Str. 507; *Anonymous*, 2 Mod. 199; 1 Wms. Saund. 347 n. (1); Gilb. Replevin, 4th edit.; *Walton v. Kersop*, 2 Wils. 354. Where the distress is for poor-rates, the defendant may plead the general issue, and give the cause of taking in evidence—43 Eliz. c. 2, s. 19: and see Co. Litt. 283. a.: and a general plea is given by statute where a distress is taken for sewer-rates—23 Hen. 8, c. 5, s. 19; and the bankrupt act gives the general issue to a defendant sued for anything done in pursuance thereof—6 Geo. 4, c. 16, s. 44." There is abundant authority, therefore, for saying that non cepit, in a case of this sort, is a statutable plea of the general issue.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court: This was an action of replevin, to which the defendant, in the first place, pleaded non cepit, and secondly made cognizance, setting out in substance that one Thomas Ayerst and one Thomas Mercer Durrant were surveyors of the parish of Hawkhurst, acting in pursuance of the statute 5 & 6 Will. 4, c. 50, and that the plaintiff was the occupier of certain property and liable in respect thereof

to be rated to the rate after mentioned, and that, whilst the said Ayerst and Durrant were and continued to be such surveyors as aforesaid, by a certain rate and assessment then made and signed by the said Ayerst and Durrant as such surveyors as aforesaid, for the repair of the highways within the parish of Hawkhurst, the sum of 51*l.* 0*s.* 5*d.* was rated and assessed upon the said property of the plaintiff, and on the plaintiff in respect thereof, and that the said rate was the first rate for the repair of the highways in the year for which the said Ayerst and Durrant were such surveyors as aforesaid, and that afterwards and before the said sum of money so rated on the property of the plaintiff had been demanded of the plaintiff as after mentioned, and whilst the said Ayerst and Durrant were such surveyors as aforesaid, the said rate was duly allowed by two justices of the division, one being of the quorum, and that the said Ayerst and Durrant, so being such surveyors as aforesaid, on the Sunday next after the allowance, caused public notice to be given of the rate and allowance; and that, although payment of the said sum of 51*l.* 0*s.* 5*d.* was afterwards, and before the granting of the summons after mentioned, demanded of the plaintiff, to wit, by the said T. M. Durrant, *so being such surveyor of the highways as aforesaid*, the plaintiff wholly refused and neglected to pay the same; and that the said T. M. Durrant, so being such surveyor as aforesaid, made complaint and gave information on oath thereof to a justice, who issued a summons to shew cause before the justices who should be present at the George Inn at Cranbrook, on the 2nd February then next, why the said sum should not be levied on his goods and chattels; which was duly served on the plaintiff, who did not appear at the time and place appointed, but the said T. M. Durrant was present; and that the said T. M. Durrant and one Thomas Perrigoe were examined on oath before the justices there, and that thereupon the justices made their warrant in writing, directed

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to the surveyors of the highways of the parish of Hawk-hurst, and to the constable of the said parish—whereby, after reciting (amongst other things) that it appeared to them, as well upon the oath of T. M. Durrant, one of the said surveyors of the highways of the said parish, as otherwise, that the said sum had been lawfully demanded by the said T. M. Durrant, but that the plaintiff had refused to pay the same, the justices required the said persons to whom the warrant was directed to make distress of the plaintiff's goods, and, if the said sum of money was not paid in five days, to sell. The cognizance further stated that the defendant was constable of the parish of Hawk-hurst, and that the warrant was delivered to Ayerst and Durrant as surveyors as aforesaid, and to the defendant as such constable as aforesaid, to be executed; and that the defendant, as such constable, was by the said Ayerst and Durrant, being such surveyors as aforesaid, required to aid and assist in the execution of the said warrant: and so the defendant, as such constable acting in aid and assistance of the said Ayerst and Durrant as such surveyors as aforesaid, well acknowledged the taking, &c.

To this cognizance, the plaintiff pleaded *de injuriâ* &c.

Upon the trial of the action before my Brother Patterson, after the taking had been proved, various objections were urged on the part of the defendant against the plaintiff's right to recover, which objections were overruled by the learned judge; but leave was reserved to the defendant to have a nonsuit entered if the court should consider the objections, or any of them, to be valid. The opinion which we have formed on the other points of the case renders the consideration of these objections unnecessary.

The defendant then proceeded to support his cognizance, and called the surveyor Durrant as his witness for that purpose. This witness was objected to by the plaintiff as incompetent. It was urged that he had an interest in the case which disqualified him by the general rules of

1. As to the competency of Durrant.

law, and that the 100th section of the 5 & 6 Will. 4, c. 60, did not apply to such an action as the present. The interest that was alleged to disqualify him was, that he had made himself liable to the attorney for the costs of the action. This ground of objection was removed by a release.

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It was then objected that he was an incompetent witness, as being an inhabitant of the parish, and so interested to increase the fund for the repair of the highways (185). This objection the learned judge thought was removed by the statute 54 Geo. 3, c. 170, s. 9: and in this opinion we agree. By that section, no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, &c., or wholly or in part supported thereby, or executing or holding any office thereof or therein, shall before any court be deemed and taken to be by reason thereof an incompetent witness for or against such district, parish, &c., in any matter relating to such rates or cesses. Although, therefore, in the cases of *Oxenden v. Palmer*, 2 B. & Ad. 236, and *The King v. The Inhabitants of Bishop Auckland*, 1 Ad. & El. 744, it was held that the statute did not apply except to cases which do properly and strictly relate to rates or cesses of the parish; yet it appears to us that the present case is one which does strictly and properly relate to the rates of the parish, because, if the defendant succeeds in his avowry, it will have the effect of entitling the defendant to a return of the goods seized in satisfaction of the highway-rate; and therefore the present is a case strictly falling within the provisions of the statute.

Competency of
Durrant re-
stored by the
statute.

But it was further objected that the two surveyors in

2. As to the
demand.

(185) In the argument in court, something was said about his having a salary out of the poor-rates; but in the judge's note it does not appear that he had a salary, or that the objection of his having a salary

was raised. If the fact had been strictly proved, it might have given rise to a different objection, under the 9th section, viz. that only one salaried surveyor can be appointed."—*Note by the Court.*

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this case constituted but one officer, and the case of *Bell v. Nixon*, 2 M. & Scott, 534, was cited; and it was argued, that, in such cases, both ought to join in doing all official acts, and in particular that the demand in this case being made by one only was insufficient. But we think the case of *Bell v. Nixon* has no application to the present case, unless the plaintiff can succeed in shewing that the several persons appointed to execute the office of surveyor constitute but one officer: and we think, on the proper construction of the statutes, he has failed to establish that point. By the former statute, 13 Geo. 3, c. 78, s. 1, the constables &c. are to make out a list of ten persons in the parish, qualified as is directed in the act; and, if there are not ten persons qualified, they are to insert in the said list the names of so many persons as are qualified as required by the act, together with the names of so many of the most sufficient and able inhabitants not so qualified as shall make up the number ten, if so many can be found, if not so many as shall be there resident, "to serve the office of surveyor of the highways;" and the justices from the said lists "shall appoint one, two, or more of such persons as aforesaid, if he or they shall in the opinions of such justices be qualified for the office of surveyor, if not, one, two, or more of the other substantial inhabitants or occupiers of lands, &c., within such parish, &c., living within three miles and within the said county, fit and proper to serve the office of surveyor of the highways for such parish, &c., if any such can be found." And *every person* so appointed, if he accepts the said office, shall be surveyor of the highways for the said parish, &c., for the year ensuing, and shall take upon him and duly execute the office aforesaid. It appears, therefore, by the express words of this act that the several persons appointed under it "to serve the office of surveyor" did not constitute one officer, but *every person* so appointed was a surveyor: and there is no more inconvenience in having several surveyors than in

having several churchwardens or several overseers of the poor.

This act of the 13 Geo. 3, c. 78, was repealed, along with many other statutes relating to highways, by the 5 & 6 Will. 4, c. 50, intituled 'An Act to consolidate and amend the laws relating to highways in England:' and by the 6th section of that act the inhabitants of every parish at their first meeting in vestry for the nomination of overseers "shall proceed to the election of one or more persons to serve the office of surveyor in the said parish for the year then next ensuing." Now, it does not appear to us to be at all a strained construction of these words, to understand by them that each of the persons nominated is to serve the office of surveyor. We see no reason for thinking that the statute 5 & 6 Will. 4, c. 50, was intended to effect any alteration in this respect of the statute 13 Geo. 3, c. 78, in which the same words "to serve the office of surveyor" are to be found, but coupled with the distinct provision before alluded to, that every person so nominated shall be surveyor and shall execute the office aforesaid.

In confirmation of this view, it is to be observed, that, in several sections of the statute 5 & 6 Will. 4, c. 50, it is implied that there may be more than one surveyor in a parish. By section 10 it is provided that the surveyor or surveyors shall deliver to the justices a statement in writing of the name and residence of the persons appointed to succeed him or them as surveyor or surveyors. And by the 11th section it is provided, that, in case it shall appear to the justices on oath "that the inhabitants of any parish have neglected to nominate and elect a surveyor or surveyors in manner and for the purposes aforesaid," the justices are authorized to appoint a surveyor till the annual meeting then next ensuing for the nomination of overseers or for the election of surveyors as aforesaid. It is true that many clauses of the act use the term "the surveyor

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of the parish," without adding the words " or surveyors:" but no inference can be drawn from this omission ; because, in section 5 (the interpretation clause), it is provided, that, wherever, in referring to any person, the word importing the singular number only is used, the same shall be understood to include several persons or parties, as well as one person or party, unless there be something in the subject or context repugnant to such construction.

On these grounds, therefore, we are of opinion, that each of the parties appointed is a surveyor of the parish. The rate, then, having been made by both surveyors, is open to no objection : and we think, that, after the rate has been well made, as a payment to one of the surveyors would undoubtedly be a good payment to discharge the party, so a demand by one of the surveyors is sufficient, the power of demanding payment being in the nature of a mere ministerial act, flowing as a natural result from the making of the rate, and the power of receiving it. In the case of the poor-rate, though the major part of the churchwardens and overseers must make the rate, yet, for the purpose of levying it, a demand by one of the overseers, and a complaint by one to the justices, is sufficient ; it being provided by the 43 Eliz. c. 2, s. 4, that it shall be lawful for the churchwardens and overseers, *or any of them*, by warrant &c. to levy the said sums : and it appears to us that the case is not different with respect to the surveyors of the highways ; it being provided by the 34th section of the 5 & 6 Will. 4, c. 50, that, for levying and recovering the rate, the surveyor shall have the same powers, remedies, and privileges as the overseers of the poor for the recovery of the poor-rate. We think, therefore, that, as well on the grounds of reason, as of the statutory enactments on the subject, the rate was well made and levied, and that the defendant is entitled to the judgment of the court.

Judgment for the defendant.

BECKETT v. WOOD.

Wednesday,
June 17th.

THIS was an action of assumpsit for wages alleged to be due to the plaintiff as secretary or cashier to a projected joint-stock banking company to be called the Middlesex County Bank. The defendant was a member of the "provisional committee" of the concern.

In an action brought by the plaintiff to recover wages alleged to be due to him as secretary of an intended joint-stock banking company, against the defendant, one of the provisional committee:—Held, that another member of the committee was a competent witness for the defendant, after a release from him.

At the trial, before Tindal, C.J., at the sittings at Westminster, after Trinity Term, 1838, the plaintiff's case being closed, the defendant called as a witness one Nicholson, for the purpose of proving a contract between the plaintiff and the committee, that the services of the plaintiff were to be gratuitous until the actual formation of the company, when he was to be retained at a salary. It appeared on the examination of Mr. Nicholson upon the *voire dire*, that he was himself a member of the committee: whereupon it was objected, on the part of the plaintiff, that the witness was incompetent on the ground of interest, he being liable as a co-contractor or co-partner with the defendant to contribute to the damages and costs in the event of a verdict passing against him. The witness was released by the defendant. It was still insisted on the part of the plaintiff that his incompetency was not removed, inasmuch as there were other members of the committee who were equally liable with the defendant and the witness, whose claim on the witness for contribution would not be affected by the release given to him by the defendant: and *Cheyne v. Koops*, 4 Esp. 112, and *Simons v. Smith*, R. & M. 29, were relied on.

Upon the authority of these two cases the Lord Chief Justice rejected Nicholson's evidence: and a verdict was found for the plaintiff.

Goulburn, Serjeant, in Michaelmas Term, 1838, obtained a rule nisi for a new trial, on the ground that the rejection

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of the witness was incorrect. He cited *Young v. Bairner*, 1 Esp. 103, *Goodacre v. Breame*, Peake, 174, *Wilson v. Hirst*, 4 B. & Ad. 760, 1 N. & M. 742, and *Jones v. Pritchard*, 2 M. & Welsby, 199.

Wilde, Serjeant, and *Barstow*, in Michaelmas Term last, shewed cause.—The witness was properly rejected. He had a distinct and direct legal interest in preventing a recovery in this action: and his situation was in no respect altered by the release. He was a co-partner or co-contractor with the defendant and the other members of the provisional committee. In the event of a recovery against the defendant, inasmuch as the only way of ascertaining the rights and liabilities of the several co-contractors, would be by taking an account in equity, the release had nothing to operate upon. If the operation of the release be to protect the witness from any claim to contribution on the part of the defendants, his liability quoad the other co-partners still remains. The effect of *Cheyne v. Koops*, 4 Esp. 112, does not seem to have been very well understood. That was an action against the defendant trading under the firm of the Neckinger Mill Company: a witness called on the part of the defendant, being asked upon the voire dire whether he was not a partner in the concern, admitted that he had a small share in it: whereupon he was objected to, and to restore his competency mutual releases (between the witness and the defendant), were tendered: but Lord Alvanley said—"He thought the witness was not admissible; that there was an interest in the witness which could not be released by the mode proposed. The partners were all bound in equity to contribute; and though, if an action at law was brought against the witness, he could plead the recovery in the present action, which would be a bar at law; yet, if Koops, the defendant, was dead or insolvent, the present plaintiff would have a right, by a bill in equity, to compel all the partners to

contribute, and the witness, of course, be subjected to his share." In *Simons v. Smith*, R. & M. 29, Lord Tenterden expressly decided that one partner could not release another, for the purpose of making him a competent witness. In *Hirst v. Wilson*, 4 B. & Ad. 760, 1 N. & M. 742, the action was brought by the plaintiffs, who were bankers, to recover the balance of an account, which had commenced whilst a partnership subsisted between the two defendants and a third person, but which extended to a period posterior to the time when that third person had ceased to be a member of the firm. He was called as a witness on the part of the defendants, to shew that the plaintiff had no cause of action against them. General releases from the defendants to the witness and from the witness to the defendants had been given. It was objected that he was incompetent, on the ground that a verdict against the defendant would diminish the assets of the partnership, which was the security the witness had against the debts due from the firm; and it was urged that the firm were in difficulties, and, if so, then this interest must continue till all the debts due from the firm were paid, and was not affected by the releases. Alderson, J., thought that on principle the objection was valid, but that the question could not depend on the insolvency of the firm; even if that had been more distinctly made out. He rejected the witness, and the plaintiff had a verdict. After argument on a rule for a new trial on the ground that the testimony had been improperly rejected, and time taken to consider, the opinion of the court was that "the *mutual releases* which had been executed by the defendants to the witness, and by him to the defendants, had made him a competent witness." The distinction between that case and the present is obvious: there, not only did the defendants release the witness, but the witness released the defendants; and the release given to the witness was executed by all the parties who could in any event

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have any claim upon him. The case would have been in point if all the co-contractors in this case had joined in releasing the witness. What is there to prevent a claim by the other co-contractors against the witness upon a settlement of the partnership accounts? It may be that the defendant, in the event of a verdict passing against him, could only charge the partnership with the amount, minus the witness's proportion: still the witness would be liable to the other parties for his proportion of the sum charged to the partnership account; and therefore he does not stand indifferent. So, in *Jones v. Pritchard*, 2 M. & Welsby, 199, there was a release by all the parties with whom there could be an account: after that the witness clearly could have no interest.

Goulburn, Serjeant, and *Cowling*, in support of the rule.—The liability of the witness was that of a co-contractor only, not that of a partner; for, there was no partnership formed: and all possible objection to his competency was removed by the release. *Cheyne v. Koops* only shews Lord Alvanley's first impression, which his lordship would not have acted upon had the defendant been present to execute a release: and that dictum is expressly over-ruled by *Wilson v. Hirst*. In *Young v. Bairner*, 1 Esp. 103, which was an action for work and labour in painting a ship of which the defendant was owner, the defendant proposed to call the master, who being objected to on the ground that he was also part-owner, a release was tendered. Lord Kenyon was of opinion that that would not make him competent, and accordingly rejected him: but, on the case afterwards coming before the court, his lordship held a different opinion. The ground of the decision in *Simons v. Smith* does not appear in the report: and the case was cited, but not acted upon, in *Jones v. Pritchard*. The court will not enter into any nice discussion as to what may be the equitable rights of the parties; but will look alone to the legal effect of the release. The liability being

joint, the release of one co-contractor operates in discharge of all of them. The point incidentally arose before the court of Exchequer in *Leckmere v. Fletcher*, 1 C. & M. 625, where Bayley, B., says: "If, on a joint contract, you have sued one, and entered judgment against him, there might be an invincible obstacle; because, upon a new action against another of the parties to the contract, the defendant would have a right to plead that he made no promise, except with the other defendant, against whom the judgment was entered, and he could not be joined. Therefore, though we have met with no case which establishes the position, we are inclined to think, that, in the case of a *joint* debt, a judgment against one joint contractor would be a bar to an action against another." Assuming that this was a case of partnership, the effect of the release would still be the same; for, the defendant, having released the witness, would have no right to charge the amount he might be called upon to pay, in the event of a verdict for the plaintiff, against the firm; it would not be a payment made by him on behalf of the *whole* firm. In *Duke v. Pownall*, M. & M. 430, several persons having agreed to bear equally the expenses of a joint undertaking, it was held by Lord Tenterden, in an action against one of them, that another of the contractors was a competent witness for the defendant, if released by him, though the rest did not join in the release.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:— This was an action brought by the plaintiff to recover wages alleged to be due to him as secretary, against the defendant as one of the provisional committee of a company intended to be established under the name of The Middlesex County Bank. On the part of the defendant one Nicholson was called for the purpose of proving that the engagement was entered into and the work performed by the plaintiff, not upon a contract for a money payment,

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but upon an agreement that the plaintiff should have a permanent employment under the company when the same should be established. Upon the examination of this witness upon the *voire dire*, it appeared that he was also one of the provisional committee, and it was thereupon contended that he was liable as a co-contractor or co-partner with the defendant to contribute to the damages and costs, and therefore inadmissible as a witness: whereupon the defendant executed a release to the witness. But the objection was then renewed, that, inasmuch as many other persons were joint contractors with the defendant and the witness, the release of the defendant alone would not enure to release the witness from any claim to future contribution on the part of such other joint contractors, and the authority of two cases at *Nisi Prius* was urged in support of the objection, which objection, on the authority of those cases, was allowed, and the witness rejected.

The liability of the witness in the existing state of the proceedings, could at most have been that of a co-contractor only, not of a co-partner; for, as no joint fund was raised, no co-partnership at that time existed. We think, however, as well upon consideration of the ground of the objection itself, as of the authority of the cases which have been determined on this point, the objection ought not to prevail.

Upon the evidence in the case, as we have already observed, the defendant and the witness were not partners, but co-contractors only; and, after the release given by the defendant to the witness, we think the defendant could not himself have set up against any other joint contractor a demand for that share of contribution, which, but for his own release, he might have derived from the witness, and which by such release he must be taken to have voluntarily abandoned against all: and consequently it appears to us that no other joint contractor could afterwards have called upon the witness for contribution. And upon the autho-

rities we cannot but think the great weight of them preponderates against the objection. Lord Alvanley, indeed, in *Cheyne v. Koops*, 4 Esp. 112, held the competency of a witness under similar circumstances was not restored; observing, that the parties were all bound in equity, and that, if the defendant was dead or insolvent, the plaintiff would have a right by a bill in equity to compel the parties to contribute, and the witness would of course be liable to his share. But an objection grounded on a possible insolvency or death can surely be no direct interest in the event of a suit. And, again, Lord Tenterden also held at Nisi Prius, in *Simons v. Smith*, R. & M. 29, that the competency of the witness, under similar circumstances, was not restored by the release. Neither of these cases was moved in Banc. Lord Kenyon, in the case of *Young v. Bairner*, 1 Esp. 103, held the same opinion at Nisi Prius: but, upon the case coming on to be argued before the court, he expressed a different opinion, and a new trial was granted.

After all these cases, the point was discussed in Banc in the two cases of *Wilson v. Hirst*, 4 B. & Ad. 760, 1 N. & M. 742, and *Jones v. Pritchard*, 2 M. & Welsby, 199. These cases are expressly in point, where the witness and the defendant are the only partners or the only co-contractors, and afford a strong authority in favour of the proposition that the witness is restored to his competency by a release from the defendant, although he may not be the only partner; for, although it is urged that the cases are distinguishable from the present on the ground of the release having been given by all the partners, yet, for the reason before assigned, we think the competency of the witness to give evidence cannot be in any manner affected by the circumstance of there being other co-contractors besides the defendant.

As the witness, therefore, was rejected in this case, we think the rule for a new trial must be made absolute.

Rule absolute.

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Wednesday,
Nov. 25th.

THE EARL OF MANSFIELD v. JOHN J. BLACKBURNE,
Executor of JOHN BLACKBURNE, deceased.

The defendant's testator was the surviving lessee, under a renewed lease, of certain salt-works, which renewed lease recited the former lease, and also the fact that the lessees "had erected and set up divers engines, machines, roads, and other conveniences, as well for the use and the convenience as for the managing and carrying on at, in, or upon the said demised premises the trade or business of rock-salt or salt-rock getters and refiners, or manufacturers of white salt," and contained a demise of "all and every the messuages, dwelling-houses, wick-houses, salt-works, erections, buildings, and other matters and things since made at,

THIS was an action brought to recover damages for the breach of certain covenants contained in a lease of salt-works at Northwich, in the county of Chester.

The declaration stated that theretofore, and during the respective lives of B. Langlois and J. Laidlaw, both since deceased, to wit, on the 26th March, 1798, by a certain indenture then made between the said B. Langlois and J. Laidlaw of the first part, the plaintiff of the second part, the said John Blackburne (deceased) and one John Blackburne of Liverpool of the third part—profert of counterpart—after reciting, that, by a certain indenture bearing date the 1st February, 1758, and made between William, late Earl of Mansfield, deceased, by his then description of the Right Hon. William Lord Mansfield, of the one part, and John Blackburne of Orford, Esq., since deceased (late grandfather of John Blackburne and John Blackburne, parties to the indenture first above mentioned), and John Blackburne, then of Liverpool, aforesaid, merchant, since deceased (son of the said John Blackburne of Orford, deceased, and the late father of the said John Blackburne of Liverpool, party above mentioned), of the other part, the said William, late Earl of Mansfield, for the considerations therein mentioned, did demise unto the said John Blackburne the father and John Blackburne

in, or upon or under the said demised premises for the use and convenience of carrying on the said demised trades," and a covenant by the lessees to keep and maintain in good and sufficient repair "the buildings, kays, and works then standing and being on the premises, and all and every other such edifices and engines as should be at any time during the term erected, set up, built, or made in or upon the demised premises," and, at the determination of the term, to deliver up "all the premises mentioned to be thereby demised, and all such buildings, kays, works, edifices, and engines, in good and complete repair and condition:"—Held, that salt-pans in which the brine was manufactured into salt, and pipes by which the brine was conveyed from the salt springs to the brine-pits—the salt-pans being made of plates of iron, supported upon brick-work, and having rings on their sides by which they were lifted off to be repaired—the pipes being metal pipes, partly carried under ground and partly along troughs supported by tressels—were not removable by the lessees at the expiration of the term.

the son, deceased, their executors, administrators, and assigns (among other things) a certain close, meadow, or parcel of land, with certain rock-salt, mines of rock-salt, and springs of brine, with free liberty, full power, and authority to and for them the said John Blackburne and John Blackburne to bore, search, dig, and sink for, get, and take to their own proper use and uses, rock-salt or salt-rock and brine at his and their own wills and pleasures, and for that purpose in the said demised premises, or any part thereof, to make, dig, or sink, or cause to be made, dug, or sunk any number of rock-salt or brine pit or pits, air or water pits, shaft or shafts, or any holes, tunnels, hollows, eyes, drifts, pipes, or cavities for the finding, discovering, getting, and taking of rock-salt, salt-rock, or brine in the said demised premises, and any parts thereof; and also free liberty in and upon the said demised premises, or any part thereof, to make, set up, erect, and build, or cause to be made, set up, erected, and built, and to use and enjoy, any rock-salt house or houses, store-house or storehouses, warehouses or other buildings, engine or engines, place or places for the laying and storing, securing, preserving, or keeping rock-salt or salt-rock, or for making, laying up, storing, securing, preserving, or keeping of white salt, as they or either or any of them should think proper; and also free liberty to build or erect any kay or kays as therein mentioned: habendum for forty years from the 25th March then next ensuing: in which said indenture of lease the said William, late Earl of Mansfield, did for himself, his heirs and assigns, covenant, promise, and agree to and with the said John Blackburne and John Blackburne, parties thereto, their executors, administrators, and assigns, that he the said William Lord Mansfield, his heirs or assigns, should and would, within the space of one month after the expiration of the term thereby demised, at the request, costs, and charges of the same John Blackburne and John Blackburne, or either of

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them, their or either of their executors, administrators, or assigns, seal and duly execute a new lease of the said demised premises and privileges, and of *all the works, pits, kays, buildings, and engines* to be by them erected and made on the said premises, unto the said John Blackburne and John Blackburne, or either of them, their or either of their executors or administrators, for the further term of forty years, to commence from the expiration of the term thereby demised: and, after further reciting that the said William late Lord Mansfield died in the year 1793—the said B. Langlois and J. Laidlaw, and also the said plaintiff, did and each and every of them did demise, lease, set, and to farm let unto the said John Blackburne deceased and John Blackburne of Liverpool, parties to the indenture first above mentioned, their executors, administrators, and assigns, the said close, meadow, or parcel of land, with the hill thereto adjoining, and the apurtenances belonging, comprised in the said indenture of lease secondly above mentioned, unto the said John Blackburne deceased and John Blackburne of Liverpool (parties thereto) as aforesaid, and all and every the messuages, dwelling-houses, wick-houses, *salt-works*, erections, buildings, pits, eyes, shafts, tunnels, *and other matters and things* since made at, in, upon, or under the said premises thereby demised, *for the use and convenience of carrying on the said salt trades*, with free liberty, full power, and authority to and for them the said John Blackburne deceased and John Blackburne of Liverpool, their executors, administrators, and assigns, or any of them, their agents, servants, or workmen, in the said meadow or parcel of land and hill thereto adjoining, or any part thereof, in such manner and by such ways and means as they the said John Blackburne deceased and John Blackburne of Liverpool, their executors, administrators, and assigns, or any of them, should from time to time think proper, during the term of forty years therein mentioned,

to bore, search, dig, and sink for, get and take to their own proper use and uses rock-salt or salt-rock and brine, at their wills and pleasures, and, for that purpose, in the said thereby demised meadow or parcel of land and hill thereto adjoining, or any part of either of them, to make, dig, or sink, or cause to be made, dug, or sunk any number of rock-salt or brine pit or pits, air or water pits, shaft or shafts, or any holes, tunnels, hollows, eyes, drifts, pipes, or cavities for the finding, discovering, getting, and taking of rock-salt, salt-rock, or brine in the said meadow or parcel of land and hill thereto adjoining thereby demised, or any part thereof, when they or either of them, their or either of their executors, administrators, or assigns, should from time to time think proper; and there to get and take all such rock-salt or salt-rock as should be there found or gotten, and from the brine springs there discovered to make white salt, and the same when so found and gotten to take, dispose of, and convert to their own proper use, benefit, and advantage; and also free liberty in and upon the said meadow or parcel of land and hill thereto adjoining thereby demised, or any part thereof, to make, set up, erect, and build, or cause to be made, set up, erected, and built, and to use and enjoy any rock-salt house or rock-salt houses, storehouse or storehouses, warehouses, or other buildings, engine or engines, place or places for the laying and storing, securing, preserving, or keeping rock-salt or salt-rock, or for the making, laying up, storing, securing, preserving, or keeping of white salt, as they or either or any of them should think proper; and among other liberties, free liberty to build and erect a kay or kays or other conveniences upon the river Weaver as therein mentioned: to have and to hold the said meadow or parcel of land and hill thereto adjoining, liberty of making rock-salt or salt-rock pits, air or water pits, brine pits or other *works*, and of getting and taking rock-salt or salt-rock and brine in the said thereby demised premises,

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Reddendum.

Covenant by
lessees to pay
the reserved
rent—

and all other the liberties, privileges, and premises whatsoever intended to be thereby demised, with their and every of their appurtenances, subject as aforesaid, unto the said John Blackburne deceased and John Blackburne of Liverpool, parties thereto, their executors, administrators, and assigns, from the 25th March last past before the date of the said indenture first above mentioned, for and during and unto the full end and term of forty years from thence next ensuing, and fully to be complete and ended, subject, nevertheless, to the provisos, conditions, restrictions, and agreements thereafter mentioned concerning the same: yielding and paying yearly and every year during the said term for the said meadow or parcel of land and hill thereto adjoining unto the said B. Langlois and J. Laidlaw, their heirs and assigns, the yearly rent or sum of 8*l.*, of lawful money of Great Britain at Michaelmas and Lady-Day, by even and equal portions; subject to the proviso or agreement thereafter mentioned for determining the same and the term thereby demised: and the said John Blackburne deceased and John Blackburne of Liverpool, for themselves jointly and severally, and for their joint and several heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the said B. Langlois and J. Laidlaw, their heirs and assigns, and also to and with the said William Earl of Mansfield and his assigns, and such other person and persons as for the time being should be entitled to the reversion immediately expectant on the determination of the term intended by the said indenture to be granted of or in the said tenements and premises, and to and with every of them, that they the said John Blackburne deceased and John Blackburne of Liverpool, parties thereto, their executors, administrators, and assigns, or some of them, should and would from time to time and at all times thereafter during the said term thereby demised, well and truly pay or cause to be paid

unto the said B. Langlois and J. Laidlaw, their heirs and assigns, or the plaintiff and his assigns, and such other person or persons as aforesaid, the said yearly rent or sum of 8*l.* at or upon the feast days aforesaid and in manner before mentioned: and also should and would well and truly pay or cause to be paid unto the said B. Langlois and J. Laidlaw, their heirs and assigns, or the plaintiff and his assigns, and such other person or persons as aforesaid, *the yearly rent or sum of 7*l.* 10*s.*, over and above the said yearly rent of 8*l.* thereinbefore reserved*, without any deduction, defalcation, or abatement whatsoever, *for each and every salt-pan which then already had been or thereafter during the term thereby demised should be erected or set up on the said demised premises, or any part thereof, or be used for the making of white salt*: and, further, that they the said John Blackburne deceased and John Blackburne of Liverpool, parties thereto, their executors, administrators, and assigns, should and would from time to time and at all times during the term thereby demised (determinable as hereinafter mentioned), at their own costs and charges, keep and maintain all and every the building and buildings, kay and kays, *work and works* then standing and being upon the said premises or any part thereof, and all and every other such edifices and engines as should be at any time during the said term thereby granted erected, set up, built, or made in or upon the said demised premises or any part thereof, in good and sufficient repair and condition, and, at the end or other sooner determination of the said term, should and would yield and deliver up *all and every the said premises mentioned to be thereby demised*, and all such buildings, kays, *works*, edifices, and engines, in good and sufficient repair and condition, unto the said B. Langlois and J. Laidlaw, their heirs or assigns, or the plaintiff or his assigns, or such other person or persons as for the time being should be entitled to the reversion immediately expectant on the

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and also a further rent of 7*l.* 10*s.* for every salt-pan then erected or which thereafter should be erected.

Covenant to repair,

and deliver up the premises demised, and all buildings, &c., &c., at the expiration of the term, in good repair and condition.

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determination of the term intended by the said indenture to be granted of or in the said tenements and premises, in a quiet and peaceable manner; as by the said indenture, reference being thereto had, will amongst other things more fully and at large appear. And the plaintiff averred that the said John Blackburne deceased and the said John Blackburne of Liverpool both died during the said term by the indenture above mentioned granted (the said John Blackburne deceased having survived the said John Blackburne of Liverpool); and, although the plaintiff had always from the time of making the said indenture hitherto well and truly performed, fulfilled, and kept all things therein contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning thereof; yet, protesting that the said John Blackburne deceased, in his life-time, and the said John Blackburne of Liverpool during their respective lives, and the survivor of them after the death of the other, and the defendant as such executor as aforesaid since the death of the said John Blackburne deceased, he having survived the said John Blackburne of Liverpool as above mentioned, had not nor had any of them performed, fulfilled, or kept anything in the said indenture contained on their part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning of the said indenture—the plaintiff in fact said that the said John Blackburne of Liverpool and John Blackburne deceased, during their joint lives, and the said John Blackburne deceased, after the death of the said John Blackburne of Liverpool, and the defendant as executor as aforesaid since the death of the said John Blackburne deceased, did not nor would, nor did nor would any or either of them, after the making of the said indenture, and during the said term thereby demised, at their own costs and charges keep or maintain all and every the building and buildings, kay and kays, *work*

and works so standing and being upon the said premises or any part thereof as aforesaid, and all and every other such edifices and engines as had at any time during the said term thereby granted been erected, set up, built, or made in or upon the said demised premises or any part thereof, in good and sufficient repair and condition, nor did they or any of them at the determination of the said term yield or deliver up all and every *the said premises mentioned to be thereby demised*, and all such buildings, kays, *works*, edifices, and engines, in good and sufficient repair and condition, unto the said B. Langlois and J. Laidlaw, their heirs or assigns, or to the plaintiff or his assigns, or such other person or persons as should be entitled as aforesaid, in a quiet and peaceable manner, according to the form and effect of the said indenture in that behalf; but, on the contrary thereof, the plaintiff said, that, although at the time of making the said indenture there were standing and being in and upon the demised premises divers buildings, kays, and *works*, to wit, fifty kays, fifty houses, fifty outhouses, fifty sheds, fifty rooms, fifty shops, fifty cottages, fifty stores, fifty stables, fifty pig-styes, fifty troughs, fifty pipes, five hundred yards of troughs, five hundred yards of pipes, fifty cranes, fifty pumps, fifty barrels, fifty rods, five hundred yards of wind-bore, fifty stages, fifty beams, fifty weighing-machines, fifty pump-trees, fifty layers, fifty shoots, *one hundred salt-pans*, fifty grates, fifty desks, fifty spouts, fifty bearers, fifty hatch-frames, and fifty doors; and although during the said term, to wit, on the said 26th March, 1798, and on divers days and times between that day and the day of the determination of the said term, which had ended and determined, to wit, the 26th March, 1838, there were erected, set up, built, and made in and upon the said demised premises divers edifices and engines, to wit, fifty other houses, fifty other outhouses, fifty other sheds, fifty other rooms, fifty other shops, fifty other cottages, fifty

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Non-repair.

Removal of
salt-pans, pipes,
&c.

other stores, fifty other stables, fifty other pig-styes, fifty other troughs, fifty other pipes, five hundred other yards of troughs, five hundred other yards of pipes, fifty other cranes, fifty other pumps, fifty other barrels, fifty other rods, five hundred other yards of wind-bore, fifty other stages, fifty other beams, fifty other weighing-machines, fifty other pump-trees, fifty other layers, fifty other shoots, *one hundred other salt-pans*, fifty other grates, fifty other spouts, fifty other bearers, and fifty other hatch-frames; and although at the end and determination of the said term, to wit, on the said 26th March, 1838, the said B. Langlois and J. Laidlaw were and each of them was dead, the said J. Laidlaw having survived the said B. Langlois, and the plaintiff was at the time of the determination of the said term entitled to such reversion as aforesaid; yet the said John Blackburne deceased and the said John Blackburne of Liverpool, afterwards, and after the making of the said indenture of demise above mentioned, and during the continuance of their joint lives, and the said John Blackburne deceased after the death of the said John Blackburne of Liverpool, and the defendant, executor as aforesaid, after the death of the survivor, to wit, of the said John Blackburne deceased, during the continuance of the said term thereby granted, to wit, on the 26th March, 1798, and from thence for a long space of time, to wit, from thence during their respective lives, and whilst they were respectively entitled to the said demised premises, until the determination of the said term, not only suffered and permitted the said buildings, kays, *works*, edifices, and engines to be and continue, and the same were for and during all that time, ruinous, prostrate, fallen down, and in great decay for want of keeping and maintaining the same in such good and sufficient repair and condition as aforesaid; but also the defendant, as such executor as aforesaid, at the expiration of the said term, to wit, on the 25th March, 1838, pulled down, took down,

dug up, tore up, and carried away divers of the said buildings, kays, *works*, edifices, and engines, to wit, forty houses, forty outhouses, forty sheds, forty rooms, forty shops, forty cottages, forty stores, forty stables, forty pig-styes, forty troughs, forty pipes, four hundred yards of troughs, four hundred yards of pipes, forty cranes, forty pumps, forty barrels, forty rods, four hundred yards of wind-bore, forty stages, forty beams, forty weighing-machines, forty pump-trees, forty layers, forty shoots, *ninety salt-pans*, forty grates, forty spouts, forty bearers, and forty hatch-frames, and at the determination of the said term left the said premises so out of repair, in such bad order and condition as last aforesaid, and without the said last-mentioned buildings, kays, *works*, edifices, and engines; and in such bad order and condition as last aforesaid yielded and delivered up the said premises and the residue of the said buildings, kays, *works*, edifices, and engines, unto the plaintiff, so being entitled to such reversion as aforesaid, contrary to the form and effect of the said indenture, and of the covenants so made by the said John Blackburne deceased, for himself, his executors, administrators, and assigns as aforesaid: to the plaintiff's damage of 5,000*l*.

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Pleas—First, as to the alleged breach in pulling down, taking down, tearing up, and carrying away of the said buildings, kays, *works*, edifices, and engines—*traverse*. Pleas.

Secondly, as to the other breaches, payment into court of 275*l*.

The plaintiff joined issue on the first plea, and replied to the second that he had sustained damage to a greater amount than 275*l*. *Issue thereon*. Replication.

The cause was tried before Vaughan, J., at the Summer Assizes at Chester in 1838. It appeared that the lessees under the lease of the 1st February, 1758, had erected upon the demised premises the buildings and machinery

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essential to the carrying on a salt-work, and had sunk a brine-pine or shaft, whence the brine was raised by means of a steam-engine and conveyed in pipes or troughs to certain cisterns or reservoirs, from which it was conducted through other pipes to the several salt-pans.

The salt-pans were shallow vessels about twenty-six feet in length and about the same in width, and were composed of plates of iron riveted together. They were not in any way fixed to the premises, but merely laid upon low brick walls or furnaces. On their sides were rings for the purpose of more conveniently lifting them from their beds for occasional repair. Of these salt-pans, ten were erected before, and two since the second lease (of the 26th March, 1798) was granted.

The pipes were some of metal and some of timber, and were partly conveyed under ground and partly above, supported upon tressels.

At the expiration of the second lease, the defendant, as executor of the surviving lessee, removed the salt-pans, pump, pump-trees and rods, and such of the fire-hatches, pipes, &c., as were worth taking away, leaving only the steam-engine: and, for the purpose of removing the salt-pans, the gable-ends of the pan-houses were taken down; and the premises generally were left in a very dilapidated state.

On the part of the defendant it was contended that the salt-pans and other things so removed, being chattels not fixed to the freehold, he was justified in taking them away at the expiration of the term.

For the plaintiff it was insisted that the articles removed were comprised within the general term "works" in the lease, and therefore, by the terms of the covenant, such as the lessees were bound to leave at the end of the term for the benefit of the lessor.

The jury found a verdict for the plaintiff upon the first issue, damages 1183*l*. (the agreed value of the salt-pans

being 1053*l.*, and that of the pipes and other things 150*l.*), and for the defendant upon the second issue.

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Evans, in Michaelmas Term, 1838, pursuant to leave reserved to the defendant at the trial, obtained a rule nisi to enter the verdict for him upon the first issue.—He cited *Lawton v. Salmon*, 1 H. Blac. 259, n., and *Naylor v. Collinge*, 1 Taunt. 19.

E. V. Williams, for the plaintiff, also obtained a rule to shew cause why, in the event of the damages on the first issue being reduced by the court (186), a verdict should not be entered for the plaintiff on the second issue.

Wilde, Serjeant, and *E. V. Williams*, in Trinity Term, 1839, shewed cause against the rule obtained by *Evans*.—At the time the lease of 1758 was granted, the salt-spring had been discovered, but no salt-works existed. The demise was of “a certain close, meadow, or parcel of land, with certain rock-salt, mines of rock-salt, and springs of brine,” with liberty to get rock-salt and brine, and to erect upon the demised premises, buildings, kays, and engines, &c., for the making and storing of salt: and the indenture contained a covenant on the part of the lessor, his heirs or assigns, within one month after the expiration thereof, to execute to the lessees a new lease of “the said demised premises and privileges, and of all the *works*, pits, kays, buildings, and engines to be by them erected and made on the said premises,” for a further term of forty years (187). The lease of 1798, which was granted by the

(186) Supposing them to hold that there was any distinction between the salt-pans and the pipes, &c.

sees to erect salt-works upon the demised premises within twelve months, and to leave the same in good repair and condition at the expiration of the term.

(187) This lease also contained a covenant on the part of the les-
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present Earl of Mansfield and the trustees of the late Earl, in pursuance of the above-mentioned covenant to renew, demised to the lessees, their executors, administrators, and assigns "the said close, meadow, or parcel of land, with the hill thereto adjoining, and the appurtenances belonging [comprised in the former lease], and all and every the messuages, dwelling-houses, wick-houses, *salt-works*, erections, buildings, pits, eyes, shafts, tunnels, *and other matters and things* since made at, in, upon, or under the said premises thereby demised, *for the use and convenience of carrying on the said salt trades*," with the like liberty as in the former lease of getting and keeping salt, &c., and erecting buildings, kays, engines, &c.; and the lessees covenanted to "keep and maintain all and every the building and buildings, kay and kays, *work and works*, then standing and being upon the said premises or any part thereof, and all and every other such edifices and engines as should be at any time during the said term thereby granted, erected, set up, built, or made in or upon the said demised premises or any part thereof, in good and sufficient repair and condition, and, at the end or other sooner determination of the said term, yield and deliver up *all and every the said premises mentioned to be thereby demised*, and all such buildings, kays, *works*, edifices, and engines, in good and sufficient repair and condition."

Looking at this lease, the intention of the parties plainly appears to have been, that, at the expiration of the term, the lessor should become possessed of "*salt-works*" in a complete state: and this could not be unless the *salt-pans*, a most essential part of a salt-work, were to be left. By the removal of the salt-pans, the character of the thing demised is wholly changed. In *Lawton v. Salmon*, 1 H. Blac. 259, n., the question arose between the heir and the executor—whether the salt-pans were so annexed to the freehold as to pass to the heir: and the case found that they might be removed without injuring the buildings. Lord

Mansfield there says: "The salt-spring is a valuable inheritance, but no profit arises from it, unless there is a salt-work; which consists of a building &c. for the purpose of containing the pans &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessaries necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir in lieu of them. But the heir gains 8*l.* per week by them. On the reason of the thing, therefore, and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt-works: he might very well have said, 'I leave the estate no worse than I found it.' That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate." Assuming Lord Mansfield's description of a salt-work to be accurate (which it clearly is not), there is nothing in that case to impeach the right of the present plaintiff, which is to be measured by the contract. *Naylor v. Collinge*, 1 Taunt. 19, turned upon the language of the particular covenant. And in *Martyr v. Bradley*, 2 M. & Scott, 25, 9 Bing. 24, where the defendant occupied a mill as tenant to the plaintiff under a lease containing a covenant on the part of the tenant to deliver up the premises at the end of the term, in good repair, "together with all locks, bolts, bars, and all other fixtures, fastenings, and *improvements* that should at any time during the term be erected, set up, or fixed upon the premises:" it was held that mill-stones set up by the tenant came within the term "*improvements*" in the covenant, and consequently could not be removed by him at the end of the term.

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Evans and Welsby, in support of the rule.—That the tenant would have a right, independently of the lease, to remove these salt-pans, cannot for a moment be doubted. In *Lawton v. Salmon*, the pans were fixed with mortar to a brick floor: here, they were not fixed at all, but merely rested on brick columns. The fact of their removal necessarily occasioning some damage to the buildings in which they were placed, cannot control the general rule of law. The only question is whether the lessees' common law right is restricted by the covenants they have entered into. *Salt-pans*, though mentioned in other parts of the lease, are not alluded to either in the granting part or in the covenant to repair or to yield up at the expiration of the term, on which the action is brought; which they would have been had the non-removal of them by the lessees been contemplated. By *salt-works* was evidently meant the *permanent* works erected for the getting of salt-rock or brine, such as Lord Mansfield describes in *Lawton v. Salmon*. The decision of this court in *Martyr v. Bradley* proceeded upon the meaning of the word "improvements."

Cur. adv. vult. (188).

TINDAL, C. J., now delivered the judgment of the court:—This was an action of covenant brought to recover damages for the breach of a covenant contained in a renewed lease of certain salt-works, whereby the lessees covenanted to keep and maintain in good and sufficient repair "the buildings, kays, and *works* then standing and being on the premises, and all and every other such edifices and engines as should be at any time during the term erected, set up, built, or made in or upon the demised premises," and at the determination of the term to deliver up "all the premises mentioned to be thereby demised, and all such build-

(188) A question also arose as to whether the defendant's right to remove the salt-pans was properly put in issue by the plea. It was but slightly glanced at in the argument, and the court took no notice of it.

ings, kays, *works*, edifices, and engines, in good and complete repair and condition." The breach stated in the declaration was, as well for not keeping in repair as for not delivering up in such good repair at the determination of the term the buildings, kays, *works*, edifices, and engines, but, on the contrary, at the determination of the term, carrying away from the premises divers articles and things enumerated in the declaration.

The defendant, as to the pulling down and carrying away the articles enumerated, pleaded "that he, the defendant, did not at the expiration of the said term pull down, take down, dig up, tear up, or carry away the said buildings, kays, *works*, edifices, and engines, or any or either of them, in manner and form" &c. And, as to the residue of the breach of covenant, that is, as to the non-repair of the premises, the defendant paid money into court, averring that the plaintiff had not sustained any damages beyond the sum so paid in. At the trial the jury found the first issue for the plaintiff, with damages for the value of the articles carried away; and they found the second issue for the defendant; the learned judge who tried the cause giving leave to move to enter the verdict on the first issue for the defendant, if the court should be of opinion that the articles which had been carried away by the tenant did not fall within the meaning of the covenant on which the action was brought.

The articles for the removal of which the action was brought consisted of certain salt-pans, in which the brine was manufactured into salt; and also certain pipes, by which the brine was brought from the salt spring into the brine pits: the salt-pans being made of plates of iron, supported upon brick-work, and having rings on their sides, by which they were lifted off to be repaired: the pipes being metal pipes, partly carried under ground and partly along troughs supported by tressels. No real distinction, however, appears to us to arise between the salt-pans and

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the pipes, as to the application of the law which we conceive to govern the present case.

If this had been the ordinary case between landlord and tenant, as to the right of the latter to remove fixtures or other things erected on the premises, at the end of the term, we should have entertained no doubt but that the salt-pans had been removable by the tenant, as well from the nature and description of their annexation to the freehold, as upon the doctrine laid down by Lord Mansfield in *Lawton v. Salmon*, 1 H. Blac. 259, n., "that it would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt-works: he might very well have said, 'I leave the estate no worse than I found it.' That would be for the encouragement and convenience of trade, and the benefit of the estate." But the question before us does not turn upon any general rule of law, but upon the interpretation of a positive contract into which the parties have entered with each other; and the point we have to determine, is, whether under that contract it was the intention of both parties that the salt-pans should be left at the determination of the term, or that the tenant should have the power to remove them.

The lease in question is a lease granted in 1798, under a covenant to renew contained in a former lease of 1758, such former lease being recited in the renewed lease, and also set forth in the declaration. The former or original lease was a demise of a close, meadow, or parcel of land and hill, and the rock-salt, mines of rock-salt, and springs of brine in the same, with all the particular liberties enumerated in the lease, for the purpose of establishing salt-works, and making salt for sale, "and all such other liberties and privileges as were usually enjoyed by the proprietors of rock-salt pits or brine pits in or near Northwich, in the said county of Chester." And it appears from that lease, that it was granted before the first erection or creation of the salt-works, which were to be made and completed by

the tenants under the powers given by such lease. It further contains a covenant on the part of the lessors, within one month after the expiration thereof, to execute a new lease of the said demised premises and privileges, "and of all the works, pits, kays, buildings, and engines to be by them erected and made on the same premises;" importing therefore that the renewed lease should be a lease of such salt-works as at the date of the renewal might have been erected, made, and worked under the former lease. The original lease then contains a covenant to pay, amongst other rents, an "additional rent of 7*l.* 10*s.* for every salt-pan which during such further term should be erected, worked, or made use of by the said tenants for the making of white salt."

Now, that a salt-pan is part of the works necessary for the making of white salt from brine, appears from the lease itself to have been well understood by both the contracting parties; it was so essential a part that it forms the basis of the calculation of the rent to be paid by the tenant; and, further, this salt-pan is by the lease itself described to be "erected, worked, and made use of by the tenants in making salt."

The renewed lease, after reciting the former lease, recites also the fact that the lessees "had erected and set up divers engines, machines, roads, and other conveniences, as well for the use and the convenience and for the managing and carrying on at, in, or upon the said demised premises the trade or business of rock-salt or salt-rock getters and refiners or manufacturers of white salt;" and, after this recital, contains a demise to the defendant's testator and the other lessee, not only of the close, meadow, or parcel of land and hill, as in the original lease, but also a demise of "all and every the messuages, dwelling-houses, wick-houses, salt-works, erections, buildings, and other matters and things since made at, in, upon, or under the said demised premises, for the use and convenience of carrying on the said demised

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trades." And under this demise of the salt-works and other things as they were then carrying on, we think must be included all that was erected and set up on the premises that was essentially necessary to constitute a *salt-work*, and that such description must include salt-pans, without which the trade of a manufacturer of brine salt could not be carried on at all, and which salt-pans, it is to be observed, are by the very terms of the lease described to be "erected and set up." The language of the lessees' covenant for payment of the additional rent of 7*l.* 10*s.* is in this respect clear and unambiguous: it is "for each and every salt-pan which already hath been or hereafter during the term hereby demised shall be *erected or set up on the said demised premises, or used for the making of white salt.*"

The legal construction of the words of demise in the renewed lease being therefore sufficient, as we think they are, to comprise the salt-pans then erected or set up "on the premises," as a necessary and constituent part of the salt-works, we think the construction of the covenant to yield and deliver up at the end of the term "all and every the premises demised," must be equally large and comprehensive, and must be held to include the salt-pans, without which the salt-works demised have lost their character and use, and must cease to be salt-works altogether.

It has been urged in argument, that, as the term "salt-pans" occurs so repeatedly in the lease, the inference is that the parties would have mentioned them specifically by name in the covenant to leave on the premises, if they had been intended to be comprised within it: but we think the answer given at the bar is sufficient—that the parties might avoid the expression of this particular article, from the apprehension that any others which were necessary to constitute a salt-work might be held to be excluded because not enumerated.

Looking, therefore, to the legal construction of the covenant, we think it comprises the salt-pans as a thing

erected or set up on the premises, and which is at the same time essential to the existence of the salt-works demised; and consequently that the rule for setting aside the verdict on the first issue, and entering it for the defendant, must be discharged.

The cross rule obtained by the plaintiff, which has now become unnecessary, must at the same time be also discharged.

Rules discharged.

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BROOK and Others, Assignees of ISAAC JEROM, a Bankrupt, v. MITCHELL, SIR G. CARROLL, Knight, and SIR M. MONTEFIORE, Knight.

THIS was an action of trover brought by the plaintiffs as assignees of one Isaac Jerom, a bankrupt, against the defendant Mitchell, a judgment-creditor of the bankrupt, and the two other defendants, the sheriff of Middlesex, for seizing and selling the goods of Jerom under a writ of fieri facias.

The plaintiff declared upon a possession of the goods by Jerom before he became bankrupt, and a conversion by the defendants before the bankruptcy.

The defendant Mitchell pleaded—first, not guilty—secondly, that the said Isaac Jerom was not lawfully possessed as of his own property of the said goods and chattels in the declaration mentioned—thirdly, that, before Jerom became a bankrupt as aforesaid, and whilst he was possessed of the said goods and chattels in the declaration mentioned, to wit, on the 17th March, 1837, Mitchell recovered judgment against Jerom in the court of King's Bench for a certain debt of 950*l.* and 65*s.* damages, and sued out a writ of fi. fa. thereon, directed to the sheriff of

*Tuesday,
June 9th.*

Quere, whether a judgment and execution on a warrant of attorney not filed within twenty-one days after its execution, pursuant to the 3 Geo. 4, c. 89, be fraudulent and void as against the assignees under a fiat issued upon an act of bankruptcy committed after execution executed.

At all events an action of trover, alleging a wrongful conversion before the bankruptcy, cannot be maintained.

And semble, that the remedy, if any, would be by an action for money had and received, or by a

special action on the case founded on the statute.

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Justification
 under a seizure
 and sale under
 an execution
 before the
 bankruptcy of
 Jerom.

Middlesex, whereby the said sheriff was commanded that of the goods and chattels of Jerom in his the sheriff's bailiwick he should cause to be levied the debt and damages aforesaid; and which said writ was afterwards, and before Jerom became a bankrupt, to wit, on the day and year last aforesaid, delivered to Sir G. Carroll and Sir M. Montefiore, then being sheriff of Middlesex, in due form of law to be executed; by virtue of which said writ the said Sir G. Carroll and Sir M. Montefiore, so being such sheriff of Middlesex as aforesaid, afterwards, and before the return of the said writ, and before the said time when &c., and before Jerom became a bankrupt, to wit, on the 8th November, 1837, made their warrant to levy the said debt, damages, and costs; which said warrant afterwards, and before the return of the said writ, and before the said time when &c., and before Jerom became bankrupt, to wit, on the day and year aforesaid, was delivered to the bailiffs to be executed in due form of law; by virtue of which said writ and warrant, the said bailiffs, and the defendant Mitchell as the servant of the said bailiffs, and by their command, afterwards, and before the return of the said writ, and before Jerom became a bankrupt, to wit, at the same time when &c., did then seize and take in execution the said goods and chattels of Jerom in the declaration mentioned, for the purpose of levying the monies so directed to be levied by the indorsement on the said writ and by the said warrant as aforesaid, and did then, and before Jerom became a bankrupt, by sale thereof levy a certain sum of money, to wit, 529*l.* 4*s.* 5*d.*, part and parcel of the debt and damages, costs and charges aforesaid; which was the same conversion in the declaration mentioned—verification.

Sheriff's pleas.

The sheriff pleaded—first, not guilty—secondly, that the plaintiffs were not assignees of the estate and effects of Jerom—thirdly, a plea similar to Mitchell's third plea.

To Mitchell's third plea, the plaintiffs replied, that, before the conversion of the said goods and chattels in the declaration mentioned, and after the making and passing of a certain act of parliament made and passed in the session of parliament held in the 3 Geo. 4, intituled "An act for preventing frauds upon creditors by secret warrants of attorney to confess judgment," and after the 29th September, 1822, and before the commencement of this suit, and before the bankruptcy of Jerom, to wit, on the 7th July, 1834, he, Jerom, was indebted to one B. Brook, a subject of this realm, in 100*l.* and upwards, and to divers other persons in divers large sums of money, and so remained and continued up to the period of his bankruptcy thereafter mentioned; and the said Jerom was then a trader, dealer, and chapman, and thence continually until the issuing of the fiat in bankruptcy thereafter mentioned was a livery-stable keeper, dealer, and chapman, and then exercised the trades of a livery-stable keeper and horse-dealer, and was a trader within and subject to the provisions of the statutes in force concerning bankrupts: that, after the passing of the said first-mentioned act of parliament, and after the said 29th September, 1822, and whilst Jerom was such livery-stable keeper and horse dealer and trader, and so subject to the statutes in force concerning bankrupts as aforesaid, and whilst Jerom was so indebted to the said B. Brook and to his said other creditors as aforesaid, and before the said conversion, and before the commencement of this suit, to wit, on the 7th July, 1834, he, Jerom, at the request of the defendant Mitchell, signed, sealed, and as his act and deed delivered to the defendant Mitchell a certain instrument in writing called a warrant of attorney to confess judgment for 950*l.* at the suit of Mitchell: that the said instrument in writing called a warrant of attorney to confess judgment so being executed and delivered as aforesaid, he the defendant

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Replication to
the third plea.Jerom, a trader,
subject to the
bankrupt laws,on the 7th July,
1834, executed
the warrant of
attorney.

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Judgment entered up thereon, March 17, 1837,

and fi. fa. issued.

Warrant of attorney not filed pursuant to 3 Geo. 4, c. 39, s. 1.

Mitchell afterwards, to wit, on the 17th March, 1837, caused the said judgment to be entered up of record in the said court of King's Bench against Jerom for the said sum of 950*l.*, and also for 65*s.* damages: that, the said judgment so entered up by the defendant Mitchell on the said warrant of attorney in the replication before alleged, was signed and entered up entirely on the said warrant of attorney in the replication before mentioned, and that there never was at any time any other warrant of attorney or any other authority whatever to enter up or sign judgment in any of the courts at Westminster against Jerom at the suit of Mitchell except as thereinbefore mentioned, and that the said thereinbefore mentioned judgment on the said warrant of attorney as in the replication mentioned was the same judgment as that in the last plea of the defendant Mitchell mentioned, and not another or a different one: that, for obtaining satisfaction on the last-mentioned judgment, he the said Mitchell sued out a writ of fi. fa. in manner and form as the defendant Mitchell had in his said last plea set forth and alleged, and that the said writ of fi. fa. so sued out on the said judgment as in the replication before mentioned was sued out and founded entirely on the said judgment on the said warrant of attorney in the replication mentioned, and that there never was at any time any other judgment in any of the courts at Westminster, or any other judgment whatever to authorize or warrant such fi. fa., except as therein mentioned, and that the said writ of fi. fa. so sued out by Mitchell on the said judgment on the said warrant of attorney as in the replication mentioned, was the same writ of fi. fa. as in the said last plea of Mitchell mentioned, and not another and a different one; that neither the said warrant of attorney (the same being a warrant of attorney to confess judgment in a personal action as aforesaid), nor any true copy thereof nor the attestation thereof nor the

defeazance or indorsements thereon, nor any or either of them, nor any true copy of such attestation, defeazance, or indorsements, or of any or either of them, was within twenty-one days after the execution of the said warrant of attorney filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments in the said court of King's Bench, in pursuance and according to the provisions of the said act of parliament in the replication first above mentioned; and that, after the expiration of twenty-one days next after the execution of the said warrant of attorney, and after the said 29th September, 1822, and after the said conversion in the declaration mentioned, and before the commencement of the suit, to wit, on the 12th February, 1838, Jerom so being then and continuing to be such dealer and chapman and trader within and subject to the provisions of the statute passed in the 6 Geo. 4 [c. 16], and so being then indebted to the said B. Brook in the sum of 100*l.* and upwards as aforesaid, became and was a bankrupt within the true intent and meaning of the last-mentioned statute; and thereupon, the said last-mentioned debt continuing due, a certain fiat in bankruptcy, upon the petition of the said B. Brook, was afterwards and before the commencement of the suit, to wit, on the 13th February, 1838, duly issued &c. &c., and the plaintiffs chosen assignees &c.: and that the said judgment on the said warrant of attorney was not signed nor entered up by Mitchell as aforesaid within the said space of twenty-one days from the day of the execution of the said warrant of attorney, nor was the said execution on the said judgment so signed and entered up against Jerom by Mitchell as aforesaid issued at any time within the said space of twenty-one days from the execution of the said warrant of attorney: whereupon, and by force of the statute in such case made and provided, the said warrant of attorney, and the said

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Jerom became
bankrupt Feb.
12, 1838.

Fiat Feb. 13.

Judgment and
execution
fraudulent and
void as against
the assignees.

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judgment and execution thereon, being the said judgment and execution thereon attempted to be justified in the said last plea of the defendants, became and were and are fraudulent and void against the plaintiffs, so being such assignees as aforesaid under the said fiat against Jerom as aforesaid; and the plaintiffs, as such assignees as aforesaid, became and were and are entitled to recover back and receive for the use of the creditors of Jerom at large, all and every the monies levied or effects seized under and by virtue of the said judgment and execution—verification.

There was a similar replication to the third plea of the other two defendants.

General demur-
rer by Mitchell.

The defendant Mitchell demurred generally to the replication to his third plea.

Special demur-
rer by the sher-
iff.

Writ a sufficient
justification.

The other defendants (the sheriff) demurred specially to the replication to their third plea; assigning for causes—that the replication furnished no answer to the plea, inasmuch as it appeared by the plea that the defendants were sheriff of the county of Middlesex, and were commanded by her Majesty's writ to levy an execution on the goods of Jerom, and they the defendants were fully justified by the said writ, and the circumstance of the judgment having been entered up on a warrant of attorney as in the replication mentioned was immaterial to the merits of the question as between the plaintiffs and the sheriff—that, the execution having been completed before the bankruptcy of Jerom, the plaintiffs had no title to sue as assignees under the 3 Geo. 4, c. 39—that it was not stated in the replication that Jerom was insolvent or in a state of insolvency, or had committed an act of bankruptcy, at the time when he delivered the said warrant of attorney to Mitchell—that the plaintiffs were not entitled to bring an action of trover for the goods and chattels in the declaration mentioned by reason of the enactments

Execution not
avoided by the
statute.

Trover not
maintainable.

of the said statute—that the replication was a departure from the declaration, inasmuch as it introduced a new cause of action, and purported to be founded upon the said statute, whereof no mention was made in the declaration—that it contained no averment that the goods and chattels were the property of the plaintiffs, or that they were in the possession of Jerom or of the plaintiffs after the bankruptcy of Jerom—that it did not state that the defendants had notice of the manner in which the said judgment was entered up by Mitchell, or of the said warrant of attorney not being duly filed according to the said statute—and that it was in other respects imperfect and informal.

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No averment of
notice to the
sheriff of any
vice in the
judgment.

The plaintiffs joined in demurrer (189).

The demurrer was argued in Michaelmas Term last by *W. H. Watson* for the defendant Mitchell, *C. R. Kennedy* for the sheriff, and *Erle* for the plaintiffs.

Kennedy, in support of the demurrer.—1. The execution having been completed before Jerom committed an act of bankruptcy, the case is not within the statute 3 Geo. 4, c. 39. The 1st section of the act, after reciting that “injustice is frequently done to creditors by secret warrants of attorney to confess judgments for securing the payment of money, whereby persons in a state of insolvency are enabled to keep up the appearance of being in good circumstances, and the persons holding such warrants of attorney have the power of taking the property of

1. Statute 3 Geo.
4, c. 39, no ap-
plication.

(189) One of the points marked for argument on the part of the plaintiffs, in addition to those raised by the demurrers, was—that a sheriff cannot justify converting goods under a writ founded on *no* judgment at all, or under one absolute-

ly *void ab initio*; but only under a writ founded on a judgment which has been *irregularly* obtained; and that the replication shewed the judgment on which the writ in this case was founded to have been of the former description.

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such insolvents in execution at any time, to the exclusion of the rest of their creditors," for remedy thereof enacts, "that, from and after the 29th September then next, if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeazance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in his Majesty's court of King's Bench at Westminster, or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other court, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the docquets and judgments in the said court of King's Bench." The consequences of a non-compliance with the directions of the 1st section are pointed out in s. 2; which enacts, "that, if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, *such warrant of attorney and the judgment and execution thereon shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the monies levied or effects seized under and by virtue of such judgment and execution.*" A strict and literal construction of that clause would lead to consequences the

most mischievous and absurd. A payment by a trader on the eve of bankruptcy to a creditor, such payment not being a fraudulent preference of such creditor, is good as against assignees under a fiat subsequently issued: is it to be less available as a payment where it is made under a judgment of the court? [*Tindal*, C. J.—The directions of the statute are very clear: the inconvenience would be the result of the party's own laches.] If the argument intended to be urged on the part of the assignees be correct, it must go to this extent—that a judgment and execution upon a warrant of attorney in respect of which the directions of this statute have not been complied with, may be set aside at the instance of assignees *at any time*, although the party giving the warrant of attorney was not at the time of giving it, or at the time the judgment was signed or the execution issued or executed, a person subject to the bankrupt laws—for, until a fiat issues and assignees are appointed, there is no person against whom the statute of limitations could run: see *Rhodes v. Smethurst*, 4 M. & Welsby, 42. Besides being obliged to refund the money levied, the creditor would be disabled to prove his debt under the fiat; for, *as against him* the statute of limitations *would* run — *Ex parte Dewdney*, 15 Ves. 479. This difficulty was foreseen by Lord Tenterden in *Wilson v. Whitaker*, M. & M. 8, though it did not become necessary there to decide the question. “If it were necessary,” says his Lordship, “to consider what might be the effect of such a warrant of attorney, judgment, and execution as the present, when the execution had been executed *before* any act of bankruptcy, I should be very unwilling to decide that question here. Even such a case would satisfy the words of the statute 3 Geo. 4; but it is necessary to affix a reasonable construction to a statute, and the inconvenience consequent on extending it to cases where there had been no act of bankruptcy,

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might be very great; since, in that case, a warrant of attorney might be given without the requisite formalities, and judgment signed and execution issued upon it, even before the party was at all in trade; and all these proceedings would subsequently become void. On this question, however, as the act of bankruptcy has been proved, I need not give any opinion, and I should be very unwilling unnecessarily to decide it." The only other case in which the question ever arose, was that of *Dillon v. Edwards*, 2 M. & P. 550: but there the goods remained in the hands of the sheriff, undisposed of, at the time the commission issued. The object of the legislature in passing the statute in question evidently was, to deprive the judgment-creditor of the lien he would otherwise acquire under the protecting clauses of the then existing bankrupt acts. Under the 108th section of the 6 Geo. 4, c. 16, where the bankruptcy takes place after seizure but *before sale*, the title of the assignees attaches—*Notley v. Buck*, 8 B. & C. 160, 2 M. & R. 68; *Crossfield v. Stanley*, 4 B. & Ad. 87, 1 N. & M. 668 (190): but it is otherwise where the sale takes place and the transaction is completed before the bankruptcy—*Wymer v. Kemble*, 6 B. & C. 479, 9 D. & R. 511; *Morland v. Pellatt*, 8 B. & C. 722, 3 M. & R. 411. In the case of a *seizure* under a judgment and execution upon a warrant of attorney with respect to which the directions in the 3 Geo. 4, c. 39, s. 1, have been complied with, the transaction is within the protection of s. 81 of the 6 Geo. 4, c. 16, provided no fiat issues within two months—*Godson v. Sanctuary*, 4 B. & Ad. 255, 1 N. &

(190) In that case it was held that the statute 1 Will. 4, c. 7, s. 7, exempting judgments on cognovit, and by default, confession, or nil dicit, in any action commenced adversely and without collusion,

from the operation of the 6 Geo. 4, c. 16, s. 108, does not extend to judgments on warrant of attorney, though given without collusion or intention of fraudulent preference.

M. 52; but not so where the warrant of attorney has not been duly filed. Again, the statute not only defeats the judgment and execution, but renders them *void*, and thus throws a difficulty in the way of the proof of the debt, which does not exist in the common case of a judgment by default &c., where the judgment, though unavailing for the purpose of obtaining satisfaction, is still evidence of the amount of the debt—*Taylor v. Taylor*, 5 B. & C. 392, 8 D. & R. 159. Considerable advantages, therefore, result to the assignees from the limited construction of the statute now contended for; and hardship and inconvenience that never could have been contemplated must ensue from a more extended interpretation.

2. This is at all events not a case in which trover will lie. Trover is an action that is founded on property—Com. Dig. *Action upon the Case upon Trover* (A); *Addison v. Round*, 4 Ad. & E. 799, 6 N. & M. 422; *Wilmshurst v. Bowker*, 5 New Cases, 541, 7 Scott, 561. Here there was no property in the assignees at the time of the seizure; for, their title had no relation back beyond the act of bankruptcy. They never had either the possession or the right to the possession. And, as against the debtor himself, the judgment and execution were clearly good, and the seizure and sale no wrongful conversion. In *Ward v. Clarke*, M. & M. 497, it was held that assignees cannot recover in trover goods delivered upon a transaction which the bankrupt himself could not impeach, unless the delivery is subsequent to an act of bankruptcy taking place after the petitioning-creditor's debt has accrued. If any action at all be maintainable at the suit of the assignees under the circumstances, it can only be a special action upon the case, or for money had and received—*Messing v. Kemble*, 2 Camp. 115; *Hurst v. Orbell*, 3 N. & P. 237, 8 Ad. & E. 107.

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2. Trover not
the proper form
of action.

3. It is now clearly and finally established that trover

3. Sheriff pro-
tected by the
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lies against the sheriff—*Balme v. Hutton*, 3 M. & Scott, 1, 9 Bing. 471, 1 C. & M. 262, 2 Tyr. 620; *Carlisle v. Garland*, 5 M. & P. 105, 7 Bing. 298, 2 M. & Scott, 24, 10 Bing. 452, 2 C. & M. 31, 3 Tyr. 705; *Garland v. Carlisle*, 5 Scott, 587, 3 M. & W. 152, 4 New Cases, 7. But the principle upon which those cases proceeded was, that the sheriff disobeyed the command of the writ in seizing under an execution against one man the goods of another: whereas, here, the sheriff strictly and properly obeys the writ, and therefore is not liable to be sued at all—*Parsons v. Lloyd*, 2 W. Blac. 845. As against Jerom the seizure was no act of trespass; for, as De Grey, C. J., says in *Cameron v. Lightfoot*, 2 W. Blac. 1189, “a trespass must be certain, and either an injury to the party or not so *at the time the act is done.*” The distinction between the liability of the party or his attorney and that of the sheriff is recognized in *The King v. Danser*, 6 T. R. 242, *Grant v. Bagge*, 3 East, 128, *King v. Harrison*, 15 East, 612, and *Codrington v. Lloyd*, 8 Ad. & E. 499, 3 N. & P. 442: and it is but reasonable that it should be so, seeing that the sheriff has no means of inquiring into the regularity of the process.

[A point was also made as to the retrospective effect of the statute 2 & 3 Vict. c. 29, but not much argued, the matter being under consideration in *Luckin v. Simpson*—vide, ante, p. 676. It was likewise submitted that the replication ought to have averred that Jerom was in insolvent circumstances at the time he gave the warrant of attorney. But TINDAL, C. J., observed that the words relating to insolvency occurred only in the preamble of the statute (191).]

1. Case within
 the 3 Geo. 4,
 c. 39.

Erle for the plaintiffs.—1. The words of the 3 Geo. 4, c. 39, are perfectly clear: they operate an unlimited and

(191) See the 9 Geo. 4, c. 57, s. 33: and see *Morris v. Mellin*, 6 B. & C. 446.

unqualified avoidance of all judgments and executions upon warrants of attorney as to which the directions of s. 1, have not been strictly complied with—*Dillon v. Edwards*, 2 M. & P. 550. It may be conceded that the act takes away the lien given by the 21 Jac. 1, c. 19, s. 9, and also the protection given by the various provisions of the bankrupt acts that have been referred to: and it may be that a strict interpretation of the clauses in question may give rise to some of the inconveniences that have been suggested. But that is no reason for calling upon the court to disregard the plain words of the act: and the inconvenience and the hardship of confining the statute to the case of an execution executed *after* an act of bankruptcy, as contended for on the other side, would be infinitely greater. *Dillon v. Edwards* in effect decides the case.

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2. The action is brought for a conversion in the time of the bankrupt, and not upon any possession, actual or constructive, of the plaintiffs as assignees. As against the bankrupt, the execution-creditor could acquire no title through the medium of that which the legislature have declared to be a fraud—*Rust v. Cooper*, Cowp. 629; *Horwood v. Smith*, 2 T. R. 750.

2. Action well brought.

3. The judgment and the execution being void, the sheriff has no protection: it is the same as if he had acted without any authority at all.

3. Sheriff liable.

W. H. Watson was heard in reply.

Cur. adv. vult.

TINDAL, C.J., now delivered the judgment of the court:—This was an action of trover brought by the assignees of one Jerom, a bankrupt, against Mitchell, a judgment-creditor of the bankrupt, and the two other defendants, the sheriff of Middlesex, for seizing and selling the goods of Jerom under a writ of *fi. fa.*

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The plaintiffs declared upon a possession of the goods by Jerom before he became bankrupt, and a conversion by the defendants before such bankruptcy. And the questions raised upon a demurrer to the plea of Mitchell, and to the plea of the two other defendants, and which were principally argued before us, were—first, whether the warrant of attorney upon which the judgment was entered up not having been filed within twenty-one days after its execution, and no judgment having been signed or execution issued within the same period, such warrant of attorney and the judgment and execution thereon were to be deemed fraudulent and void against the assignees under a commission which issued more than twenty-one days next after the execution of such warrant of attorney, by virtue of the provisions of the statute 3 Geo. 4, c. 39—secondly, whether the effect of that statute was altered by the provisions of the 2 & 3 Vict. c. 29.

But an objection was raised in the course of the argument on the part of the defendants, against the form of the action; and, upon consideration, we think that objection is valid, so as to render it unnecessary for us to give an opinion upon the other questions raised in the argument. That objection is, that, under the facts appearing on the record, the action of trover is not maintainable by the assignees, but that the only action maintainable, if indeed any be maintainable, is an action for money had and received to their use: and that, at all events, and in any view of the case, an action of trover laying the conversion before the bankruptcy cannot be supported.

It appears by express allegations on the record that the judgment was entered up, the *fi. fa.* issued and put into the hands of the sheriff, and the levy thereon actually made, before the act of bankruptcy was committed.

To consider, therefore, in the first place, the objection

to the form of the declaration in trover. The possession is laid in the bankrupt, and the conversion by the defendants is alleged to have taken place before the bankruptcy. But the statute of 3 Geo. 4, c. 39, above referred to, does not make the warrant of attorney and the judgment and execution void, absolutely, against all persons, but only as against the assignees under the subsequent commission. As against the bankrupt himself, therefore, the judgment was good, and the execution a valid execution; and the levy was no wrongful conversion: and so the transaction would remain a good and valid execution against him at all events up to the time of the bankruptcy. Upon no legal construction, therefore, as it appears to us, can the allegation be supported, that there was any wrongful conversion before the bankruptcy.

But, in the next place, the action of trover itself is not maintainable by the plaintiffs, because they never had the possession nor the right to the possession of these goods in themselves as assignees. By no earlier statute is the relation carried back to a further point than to the act of bankruptcy; and there are no words in the statute in question which vest the property in the goods by relation in the assignees, either from the warrant of attorney, or the judgment, or the execution.

Indeed, the statute itself appears to have provided for this difficulty of want of property in the assignees, by pointing out the remedy to which the assignees were entitled: for, by the second section, after enacting that the execution shall be deemed fraudulent and void against the assignees under such commission, it proceeds to enact "that such assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt at large all and every the monies levied or effects seized under and by virtue of such judgment and execution:" under which words of the statute they might, subject to

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all the other objections raised on the argument, have brought money had and received, or perhaps have maintained a special action on the case, upon the words of the statute; but there is nothing to enable them to bring trover.

Upon these two grounds, therefore, we think the present action not maintainable, and that there must be judgment for the defendants.

Judgment for the defendants.

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ABEYANCE.

During the abeyance of a barony descendible to heirs of the body, one of the co-heirs was attainted for treason: an act of parliament afterwards passed to restore in blood the sons and daughters of the attainted co-heir:—Held, that it was competent to the Crown to determine the abeyance in favour either of a party claiming through the co-heir who was so attainted, or of one claiming through another co-heir. *Braye and Camoys Peerages*, 108.

ACKNOWLEDGMENT.

Under the 3 & 4 Will. 4, c. 74, s. 85.

A certificate of an acknowledgment by a married woman cannot be filed without a positive affidavit that she is of full age. *In re Ann Coverley*, 147.

ACTION ON THE CASE.

See CASE.

ADDITION.

Indorsement of defendant's addition on process, not necessary in C. P. *Brown v. Hudson*, 324.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

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AFFIDAVITS.

Filing.

The court refused to enlarge the time for filing affidavits in answer to those filed in opposition to a rule to shew cause, poverty and residence of the party at a distance from London being the only excuse for not having filed them in time. *Lewis v. Kirby*, 179.

AGENT.

Authority, how executed.

The defendant authorized his agents, B. & S., to whom he was indebted, to effect in their own names an insurance upon his life. B. & S. having, subsequently to the date of the authority, taken a third person into their firm, caused the policy to be made out in the names of the *three*:—Held, that this was not a proper execution of the authority; and that B., the survivor of the firm of B. & S., could not (in the absence of any ratification by him) recover from the defendant the premiums paid on this policy, as money paid to his use. *Barron v. Fitzgerald*, 460.

And see BANKRUPT, V.

AGREEMENT.

Construction and Effect of.

One D., the captain of a vessel be-

D D D

longing to the defendant, entered into an agreement with the defendant, under which he was to have the command of the vessel for a voyage to India and back, and to have for his own use the cabin accommodation for passengers, for which he was to pay the owner a certain sum. For purposes of his own, D. abandoned the ship before her arrival in India, whereupon the command was assumed by F., the chief mate. After D. had left the ship, he wrote to F., giving him directions as to the disposal of certain property of his, then on board. The owner, as soon as he became acquainted with the fact of D. having quitted the ship, wrote to F. confirming him in the command, and desiring him to retain every thing on board belonging to D., who was largely indebted to him. D. returned to England; and on the 18th October, 1834, at the instance of the defendant, wrote him the following letter:—"I hereby authorize and request you to keep possession of all cabin furniture and other property of mine on board the Bolton when she arrives, and to place the value of the same to the credit of my account with you." On the 18th December, a fiat in bankruptcy issued against D. upon an act of bankruptcy committed by him on the 2nd. The vessel arrived in London on the 5th December:—Held, that the defendant had such a possession of the goods before the bankruptcy as to entitle him to retain them as against D.'s assignees, by virtue of the authority of the 18th October. *Belcher v. Oldfield*, 221.

And see CONTRACT.

ALIEN AMY.

May sue for a Libel.

An alien amy, though he has never been in this country, may maintain an

action for a libel published in this country. *Pisani v. Lawson*, 182.

AMENDMENT.

I. *Of Particulars of Demand.*

In 1835, the plaintiff commenced an action in this court against the defendants as executors of one W. W. (who died in 1831), for work done under a contract with the testator for the building of a mansion in Wales, and delivered particulars of his demand in July, 1837. In June, 1837, a second action was brought against the defendants in the court of Exchequer, charging them personally in respect of work alleged to have been done since the testator's death: in this action also particulars were delivered. In 1838, both actions, and all matters in difference, were referred to arbitration. The award made by the arbitrator having in Hilary Term, 1839, been set aside, and the plaintiff finding that he could not support the second action, and conceiving that he could substantiate his claim against the defendants in the first action to a greater extent than charged in the particulars delivered therein, obtained in Trinity Vacation a judge's order to amend his particulars by adding thereto the items in respect of which the second action was brought:—The court refused to discharge the order. *Jones v. Corry*, 515.

II. *Of Declaration.*

On the 2nd January, 1837, the plaintiff commenced an action of trover against the collector of Customs for the port of London, to recover the value of certain tobacco, the bill of entry of which the defendant had refused to sign, so as to enable the plaintiff to obtain it on payment of the lesser duty payable on wrecked goods. The time

limited for bringing such an action expired on the 10th February. On the 13th May, the facts were stated on both sides in a case for the opinion of the court, one of the questions in the case being whether or not the plaintiff was liable in this form of action. The plaintiff suspended his proceedings, to await the decision of the court of Queen's Bench in a case pending in that court, which involved a similar question. That court, having in June, 1839, decided that an *action on the case* would lie for the non-feazance—the plaintiff, in the following Michaelmas Term, applied for leave to amend his *declaration* by adding a count in *case*:—The court, under the special circumstances, allowed the amendment. *Legge v. Boyd*, 502.

III. *Of Judge's Order.*

The court amended an order made by a judge at chambers under the interpleader act, at the instance of the execution-creditor; but directed the latter to pay the costs of all the parties who had appeared to oppose the rule nisi, with the exception of the sheriff. *Tilleard v. Cave*, 511.

IV. *At Nisi Prius, under 3 & 4 Will.*

4, c. 42, s. 23.

A declaration in case against a surgeon for negligence, alleged that *the plaintiff*, at the request of the defendant, *had employed the defendant* to bestow the care &c. of him, the defendant, in the profession and business of a surgeon and apothecary &c., and the defendant then accepted and entered upon such employment as such surgeon; and then proceeded to allege the duty resulting from such retainer:—Held, that the case was one in which, if necessary, the judge at the trial might have allowed an amendment under the 3 & 4 Will. 4,

c. 42, s. 23, upon payment of nominal costs. *Gladwell v. Steggall*, 60.

ARBITRATION.

I. *Order of Reference.*

An order of reference having been rendered abortive in consequence of obstacles wilfully presented by the plaintiffs, trustees, and their cestui que trust, the court, at the instance of the plaintiffs, directed a new trial, but ordered that they should pay the defendants all the costs that they had by their conduct uselessly entailed upon them. *Morgan v. Miller*, 266.

II. *Setting aside Award.*

1. The court refused to set aside an award, on to stay the proceedings, on the ground that the arbitrator had been imposed upon by false evidence. *Pilmore v. Hood*, 180.

2. Milne and Haswell, merchants, and copartners, agreed to submit to arbitration all matters in difference between them and one Hare; the submission containing a provision, that, in case of the death of either party before the making of the award, the award should be delivered to the personal representatives of the party dying, or such of them as should desire the same. Haswell died on the 3rd July, 1838. Several meetings were held by the arbitrators between that day and the 3rd November, when Hare for the first time protested against their proceeding unless Haswell's executors were made parties. The award was made in March, 1839, the personal representative of Haswell not having been made a party to the reference:—The court refused to set aside the award. In *re Hare, Milne, and Haswell*, 367.

3. The court refused to set aside an award made by two of three arbitrators, upon a suggestion by the third that the

award had been influenced by the opinion of counsel taken by the others upon a case inaccurately stated: the two arbitrators swearing that the case was not inaccurately stated, and that their minds had been made up as to the award before the opinion was taken. *Ib.*

4. By a judge's order, a cause and all matters in difference between the plaintiff and defendant were referred to arbitrators, with power, should they find any money to be due from the defendant to the plaintiff, to direct one moiety of it to be paid by the defendant at such time and place as they should think fit, and the remaining moiety to be retained by the defendant in part payment of the purchase-money of the defendant's share of a brig, in respect of which the disputes had arisen; and the arbitrators were to be at liberty to award to the plaintiff, if they should think fit, such sum as he should be entitled to, if any, in consequence of his providing another master to take charge of the brig on her then present voyage from London to Archangel and back, in order to have the matters in difference brought to a speedy conclusion. The arbitrators awarded that there was due from the defendant to the plaintiff (including the sum the plaintiff was entitled to for providing a new master as aforesaid) 50*l.* 17*s.* 6*d.*, a moiety of which they directed the defendant to pay on a certain day, and to retain the other moiety in part payment of the purchase-money of his share of the brig. One of the matters in difference before the arbitrators was, by which of the parties certain debts incurred on account of the brig should be borne. As to this the arbitrators awarded that debts incurred previously to a given day should be borne by them in equal moieties, and those incurred subsequently by the plaintiff alone; and

they ordered the plaintiff to give the defendant a bond of indemnity in respect of such last-mentioned debts:—Held, that the award was good—*Maule, J.*, doubting as to the bond. *Brown v. Watson*, 386.

5. The defendant agreed to purchase of the plaintiff the goodwill of a manufacturing business, with all the machinery, premises, &c., for a sum of 3,500*l.*, payable by certain instalments, and an annuity of 300*l.* payable quarterly. The first two instalments, and the first quarterly payment of the annuity, being in arrear, the plaintiff brought an action to recover them. At the trial a verdict was found for the plaintiff, damages 10,000*l.*, subject to the award of an arbitrator to whom the cause and all matters in difference were referred—3,500*l.* to be paid by the defendant to the arbitrator on a certain day, to be paid out by the latter to such of the parties as he might think fit; and the arbitrator to order and determine what he should think fit to be done by the parties respecting the matters in dispute. The 3,500*l.* was duly paid to the arbitrator: and he by his award directed that the plaintiff was entitled to have a verdict entered for him on the several issues joined in the cause; that the 3,500*l.* should be paid to the plaintiff; that the defendant should pay to the plaintiff the further sum of 2567*l.*, and the costs of the reference and award; and that the plaintiff should execute a release:—Held, that the award was good, though it did not distinguish how much was to be paid by the defendant in respect of the cause, and how much in respect of the matters in difference. *Taylor v. Shuttleworth*, 565.

6. The defendant committed an act of bankruptcy on the 14th December, upon which a fiat issued on the 19th: the arbitrator (with notice of the act

of bankruptcy, and of the fact of a docket having been struck) made his award on the 18th:—Held, no ground for setting aside the award. *Ib.*

ARREST.

Privilege from.

1. A barrister attending the court to hear judgment pronounced in a cause in which he is concerned, is entitled to privilege from arrest *eundo, morando, et redeundo*. *Newton v. Harland*, 70.

2. A *party* is entitled to a similar privilege. *Ib.*

ARREST OF JUDGMENT.

See PLEADING, I., 2, 3.

ATTACHMENT.

Against the Sheriff.

On the 3rd August, the sheriff levied under a writ of *fi. fa.* On the 4th September, he was ruled to return the writ in eight days. On the day after the expiration of this rule the defendant died. The writ was not returned until the 1st November:—The court set aside, on payment of costs, an attachment against the sheriff, it not appearing that the plaintiff could have sustained injury by the officer's neglect. *The Queen v. The Sheriff of Essex*, 363.

ATTAINDER.

See TREASON.

ATTORNEY.

I. Privileges of.

Though attorneys plaintiffs are not within the Middlesex court of conscience act, 23 Geo. 2, c. 33, s. 19, their personal representatives are. *Bishop v. Marsh*, 128.

II. *Bill of Costs.*

1. A charge for preparing a warrant of attorney renders an attorney's bill taxable. *Painter v. Linsell*, 453.

2. Upon the negotiation of a loan by way of annuity from the plaintiff to the defendant, one D., the plaintiff's attorney, prepared the agreement and securities *on behalf of both parties*, the agreement providing that the expenses should be paid by the defendant; but, one of the securities being a warrant of attorney, another attorney attended on the defendant's part to see it executed and to attest it:—Held, that the defendant was entitled to call upon D. to deliver his bill, with a view to its taxation. *Ib.*

III. *Negligence.*

An attorney employed to prosecute an appeal against an order for the removal of a pauper, permitted the next sessions to pass without causing the appeal to be entered and respited, and failed to comply with the directions of the 81st section of the 4 & 5 Will. 4, c. 76, as to the notice and statement of the grounds of appeal. The justices at a subsequent sessions having refused to entertain the appeal:—Held, that the plaintiff could not maintain an action for his costs. *Huntley v. Bulwer*, 325.

AUTHORITY.

Execution of—See AGENT.

AWARD.

See ARBITRATION.

BAIL.

Deposit in Lieu of, under 43 Geo. 3, c. 46, s. 2.

The defendant was arrested on the 1st November by virtue of a writ of

capias issued pursuant to the 1 & 2 Vict., c. 110, s. 3; he thereupon deposited with the officer the sum indorsed on the writ, and 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2; on the 8th he put in special bail to the action; on the 13th, one of the bail being excepted to, the defendant rendered:—Held, that the *putting in* bail sufficiently brought the defendant into court to enable him to move to have the money paid out of court to him, notwithstanding no appearance had been entered; and that the render was in time. *Brook v. Gunning*, 343.

BANKRUPT.

I. *Petitioning-creditor's Debt.*

1. Where a petitioning-creditor's debt is compounded of debts due to two individuals, and one is found to be insufficient, the debt of another individual may be substituted for the debt so found insufficient. *Byers v. Southwell*, 238.

2. The petitioning creditors were in pleading stated to be A. and B., C. and D., and E. and F., without distinctly alleging them to constitute firms:—Held, no ground for holding the fiat void. *Ib.*

II. *Rights and Duties of Assignees.*

1. Quære, whether a judgment and execution on a warrant of attorney not filed within twenty days after its execution, pursuant to the 3 Geo. 4, c. 39, be fraudulent and void as against the assignees under a fiat issued upon an act of bankruptcy committed after execution executed? *Brook v. Mitchell*, 739.

2. At all events an action of trover, alleging a wrongful conversion before the bankruptcy, cannot be maintained. *Ib.*

3. And semble, that the remedy, if any, would be by an action for money had and received, or by a special action on the case founded on the statute. *Ib.*

4. In trover by the assignees of bankrupts to recover the value of goods alleged to have been delivered to the defendants in contemplation of bankruptcy, evidence that the goods were delivered in payment and satisfaction of a debt due from the bankrupts to the defendants, does not support a plea alleging that the goods were *bonâ fide* sold and delivered to the defendants by the bankrupts before the issuing of a fiat, and without notice of an act of bankruptcy, and that the defendants *bonâ fide* paid for them. *Backhouse v. Jones*, 148.

5. Evidence that other creditors of the bankrupts to whom goods had been delivered under similar circumstances, had subsequently given them up to the assignees, or paid their value:—Held, irrelevant and inadmissible. *Ib.*

III. *Agreements by Assignees for Distribution of the Estate.*

By a memorandum of agreement (made subject to the approval of a meeting of the creditors to be specially called for that purpose according to the statute), between the plaintiffs, assignees of a bankrupt, and the defendant, it was agreed that the defendant should within two months pay to the plaintiffs 2012*l.*, supposed to be equal to 10*s.* in the pound upon all the debts then proved against the estate of the bankrupt; that the plaintiffs should retain out of the estate (to the extent of 500*l.*) such further sum as should be equal to 10*s.* in the pound upon debts not then known or ascertained; that the fiat should be worked in the usual way; that, after satisfaction of the defendant's lien, he should deliver up all

securities in his hands, and that the defendant's claim of 500*l.* for a bonus, and 200*l.* for a certain lease, should be allowed in full, but that, subject thereto, his debt should undergo the examination and correction of an accountant; and that, after payment out of the estate of the full amount of the defendant's claims when ascertained, so far as the estate would extend, the surplus of the estate should be divided among the creditors, but the dividends of such as should previously have received 10*s.* in the pound should to that extent be paid over to the defendant in one week after the dividend should be declared, but that the excess beyond 10*s.* in the pound should belong to the creditors:—Held, that the agreement was void, inasmuch as it professed to stipulate for an administration of the bankrupt's estate that was at variance with the bankrupt laws, and there was no mutuality. *Steaines v. Wainwright*, 280.

IV. *Property in Order and Disposition of Bankrupt.*

In trover against assignees for goods claimed by them as belonging to the bankrupt, or as being in his order and disposition at the time of his bankruptcy, with the consent of the true owner, the defendants offered in evidence declarations made by the bankrupt before his bankruptcy, as to the goods in question, in the absence of the plaintiff, in order to shew an exercise of dominion over them as owner. This evidence having been rejected, and the jury having found for the plaintiff—the court sent the cause down to a new trial. *Sharp v. Newsholme*, 21.

V. *Fraudulent Transfer.*

1. Goods were sold by the defendant as agent of one C., in contemplation of C.'s bankruptcy, for the purpose of

raising money for the benefit of the defendant and C., and defrauding C.'s creditors. The purchasers paid a fair price for the goods, and were not parties to or in any way cognizant of the fraud:—Held, that a sale effected under such circumstances did not constitute an act of bankruptcy. *Harwood v. Bartlett*, 171.

2. Held also, that the handing over to the defendant by C. of blank delivery orders for part of the goods, which were in a public warehouse, was not a gift, delivery, or transfer of the goods to the defendant, within the 6 Geo. 4, c. 16, s. 3, the defendant being merely the agent of the seller. *Ib.*

VI. *Construction of the 2 & 3 Vict. c. 29.*

The statute 2 & 3 Vict. c. 29, which enacts that all executions and attachments against the lands and tenements, or goods and chattels of a bankrupt bona fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, is not retrospective, so as to affect the vested rights of assignees under a fiat issued before the act passed. *Luckin v. Simpson*, 676.

BARRISTER.

Privilege of.

A barrister attending the court to hear judgment pronounced in a cause in which he is concerned, is entitled to privilege from arrest eundo, morando, et redeundo. *Newton v. Harland*, 70.

BILLS OF EXCHANGE.

I. Date of Drawing and Indorsement.

1. A bill of exchange must, in the absence of evidence to raise a presumption to the contrary, be taken to have

been drawn on the day on which it bears date. *Anderson v. Weston*, 583.

2. A bill was drawn in the name of A. & B. on the 2nd February, payable at three months' date; and purported to be indorsed by A. & B., but it did not appear *when*: a dissolution of the partnership of A. & B. appeared in the *Gazette* on the 20th March: there was no direct evidence of partnership beyond the preceding December, nor did it appear that the indorsee had had any previous dealings with the firm:—Held, that the latter was not bound to prove affirmatively that the indorsement took place prior to the 20th March, but that the jury were at liberty to infer from the surrounding circumstances that it did. *Ib.*

II. *Proof of Acceptance.*

In an action against the defendant charging him as the acceptor of a bill of exchange, the only evidence to affect him was, that the proceeds of the bill as well as of three promissory notes which his wife (in the defendant's name) and the plaintiffs' testatrix had jointly signed, had been applied in discharge of the defendant's debts:—Held, insufficient. *Goldstone v. Tovey*, 394.

III. *Conditional Acceptance.*

G. & Co., merchants at St. Petersburg, sent to the defendants, merchants in London, an order for the purchase and shipment on their account of fifty cases of *Havannah* sugar, with directions to the defendants to draw for the amount upon the plaintiff at Hamburg. This order was afterwards countermanded, and another order was sent by G. & Co. to the defendants for twenty cases of *Brazil* sugar, for which they were instructed to draw upon the plaintiff. The last-mentioned parcel of sugars was accordingly shipped for G.

& Co.; and, on the 6th October, 1835, the defendants drew upon the plaintiff at three months' date for the amount of the invoice. This bill was presented for acceptance on the 19th, and accepted generally. On the 21st, the plaintiff wrote to G. & Co., acknowledging the receipt of a duplicate bill of lading for the twenty cases of *Brazil* sugar, and debiting them with insurance thereon, at the same time observing that he had accepted the draft for the invoice price provisionally, under the guarantie of the drawers, assigning for reason that they (the drawers) had been accredited with him only for fifty chests of *Havannah* sugar, but not for *Brazil*, and requesting instructions on that account. On the 23rd the plaintiff also wrote to the defendants, telling them that he had accepted the bill for the present under their guarantie, as he had not yet received the "accreditiv," but that he had applied for it, and would inform them immediately when the matter was arranged. On the 30th, G. & Co., in answer to the plaintiff's letter of the 21st, wrote to him, saying that they credited him for the insurance of the twenty cases of *Brazil* sugar, and requesting him to pay the defendants' draft for their account, and to release the defendants from their guarantie. On the 1st December, the defendants wrote to the plaintiff as follows:—
"Since the 6th of last month we are deprived of your favours, and therefore also of the advice of your having acknowledged for account of G. & Co. our draft of the 6th October against the twenty chests *Brazil* sugar, which you had accepted in the interim under our guarantie: as we have in the meantime received from the said house the assurance that they had arranged the needful with you for the protection of the draft for their account, we should be

glad to have this confirmed by you, and to be relieved from our guarantie." G. & Co. stopped payment on the 20th November. The plaintiff never did formally release the defendants from their guarantie; but paid the bill when at maturity:—Held, that, under the circumstances, the acceptance must be taken to have been an acceptance on account of G. & Co., subject only to their ratification, which being given the acceptance became absolute; and consequently that the plaintiff could not recover from the defendants the amount thereof as money paid to their use. *Lohmann v. Rougemont*, 520.

IV. *Notice of Dishonour.*

In an action against the drawer of a bill of exchange, the plaintiff, to excuse the want of a notice of dishonour, averred that the acceptor had no effects of the defendant's in his hands, nor had the defendant any reasonable ground for expecting that he would have, or that he would pay the bill, nor was there any consideration for the acceptance or payment thereof, nor had the defendant sustained any damage by reason of his not having had notice of the non-payment of the bill by the acceptor. The defendant pleaded that he *was* damnified by the want of notice, the acceptor having promised to pay the bill:—Held, that the entire burthen of proving that he was damnified by the want of notice rested upon the defendant. *Fitzgerald v. Williams*, 271.

BOUNTY.

See INSURANCE.

BRAYE PEERAGE.

See ABEYANCE.

BYE-LAW,

Construction of.

By a bye-law made in 1692 by the master, wardens, and assistants of poulterers, London, it was ordered that the master, &c. might call into the livery of the company any *freemen of the company* they should think fit, and a penalty of 10*l.* was imposed upon such as being so called refused, without sufficient reason, to be of the livery. Before a person can be admitted a liveryman of any of the companies he must be a *freeman of the city of London*. The Poulterers' Company includes many who are not free of the city:—Held, that a condition, that the freemen of the company who are called to the livery must be such freemen only as are eligible by law, was necessarily to be implied from the subject-matter, and consequently that the bye-law was valid. *Poulterers' Company v. Phillips*, 593.

CAMOYS PEERAGE.

See ABEYANCE.

CARRIER.

Action for Negligence.

In an action against a carrier for negligence in the conveyance of goods by water, whereby they became wetted and spoiled, it appeared that the goods were put on board the defendant's boat under one entire contract for their conveyance from Boston to Leeds, one half to be delivered there, the other to be conveyed to and delivered at Bradford. At the trial, the plaintiff proved the contract and its execution by oral testimony; but, it appearing from the examination of one of his witnesses, that, at the time of the receipt of the goods by the defendant, two notes were delivered by him to the plaintiff (each applying to a moiety of the goods),

which ascertained the destination of the goods, and the terms upon which they were to be carried, and only one of these being produced, and the absence of the other not satisfactorily accounted for:—Held, that this was ground of nonsuit. *Thompson v. Travis*, 85.

CASE.

I. *Negligence.*

1. The second count of the declaration stated that the plaintiffs were possessed of a vault and of certain wine therein; that the defendant was about to pull down and remove, and did pull down and remove, certain other vaults and walls next adjoining the plaintiffs' vault; and thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' vault, to give due and reasonable notice to the plaintiffs of his intention to pull down and remove the said vaults and walls so adjoining the plaintiffs' vault, before he pulled down the same, so as to enable the plaintiffs to protect themselves; and also to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and removing his vaults and walls, so that for want of such care, skill, and precaution, the plaintiffs' vault and its contents might not be damaged or destroyed:—Held, that no duty was by law imposed upon the defendant either to shore up the plaintiffs' vault, or to give them notice of his intention to pull down his own. *Chadwick v. Trower*, 1.

2. Held also, that the using due care, skill, and precaution in removing his own vaults and walls, so as to prevent injury resulting to the plaintiffs' vault from the absence of such care, skill, and precaution, was not a duty by law im-

posed on the defendant, in the absence of an allegation that he had notice of the existence and nature of the plaintiffs' vault. *Ib.*

3. General damages having been given upon the whole declaration:—Held, that the allegation as to the want of notice could not be rejected, and the damages ascribed to the rest of the declaration, even if good. *Ib.*

4. A declaration in case against a surgeon for negligence, alleged that *the plaintiff*, at the request of the defendant, *had employed the defendant* to bestow the care &c. of him, the defendant, in the profession and business of a surgeon and apothecary &c., and the defendant then accepted and entered upon such employment as such surgeon; and then proceeded to allege the duty resulting from such retainer:—Held, that it was immaterial *by whom* the defendant was retained, though a distinct issue was taken by the plea upon the retainer: and that, if the allegation of employment *by the plaintiff* was material, it was supported by proof that the plaintiff (a child about twelve years old) submitted to and received the defendant's attendance. *Gladwell v. Steggall*, 60.

5. Held also, that the case was one in which, if necessary, the judge at the trial might have allowed an amendment under the 3 & 4 Will. 4, c. 42, s. 23, upon payment of nominal costs. *Ib.*

II. *Misfeasance.*

The plaintiff declared in case that he retained the defendant to print for him a certain work, and delivered to him certain paper to be used in the printing thereof; that the defendant accepted the retainer, and received the paper for the purpose aforesaid; and that thereupon it became and was the duty of the defendant to use due diligence in

the printing of the work, and to print it upon the paper so delivered to him : nevertheless, the defendant, not regarding his duty or his said retainer, did not proceed with reasonable despatch, and did not use the paper sent to him in and about the printing of the work, but wholly neglected and refused so to do, and, on the contrary thereof, wrongfully and without the license of the plaintiff, used the paper for other purposes, and wrongfully and in violation of his duty, pledged the paper with divers persons to the plaintiff unknown, to raise money for his own purposes :—Held, that *case* was the proper form of action for the wrong complained of. *Smith v. White*, 483.

III. *Malicious Arrest or Prosecution.*

1. The plaintiff was arrested at the suit of one B., and gave bail to the sheriff. The defendant, who was B.'s attorney, influenced partly by a desire to serve one of the bail, and partly by a notion that the bail was not responsible, by working upon the apprehensions of his family, induced him to sign a paper authorizing him (the defendant) to *decline on his behalf to justify as bail*. This paper the defendant sent to his agent, for the purpose of doing what was necessary upon it. The agent having accidentally permitted the justification to take place, with a view to cure the defect, *obtained a judge's order to render the plaintiff in discharge of his bail*. The order was sent to the defendant, who caused the plaintiff to be taken upon it, and conveyed to gaol, where he remained about three weeks. In an action on the case, the declaration charged that the defendant wrongfully, injuriously, and *maliciously*, and without the authority of the bail, caused the plaintiff to be rendered :—Held, that *malice* was necessarily averred, and

must be proved : and, the jury having negatived *malice*, the court refused to grant a new trial. *Porter v. Weston*, 25.

2. In an action on the case for maliciously preferring a charge of felony against the plaintiff before a magistrate, the judge told the jury that the facts proved made out a case of reasonable and probable cause ; but, inasmuch as there was a fact in the case calculated to shew that the defendant was acting *alio intuitu*, they might take that fact into their consideration ; and, if they should think he did not *believe* at the time he made it that the charge was well founded, then there was no probable cause :—Held, that this direction was correct ; and the jury having found for the plaintiff, the court refused to disturb the verdict. *Broad v. Ham*, 40.

IV. *Deceit.*

A representation made by the defendant as to the credit and circumstances of a firm of which he is a member, is a representation as to the credit of "another person," within the meaning of the stat. 9 Geo. 4, c. 14, s. 6. *Devaux v. Steinkeller*, 202.

CERTIFICATE.

See ACKNOWLEDGMENT.

CHARITABLE USES.

An aged clergyman of the Established Church, under the influence of certain ministers of the Wesleyan Society, two years before his death, conveyed to trustees for that society the house he resided in and about twenty-three acres of land, for the sum of 490*l*. It was proved that this sum passed from the grantees to the grantor at the time the conveyance was executed ; but it also appeared that shortly afterwards the

same parties obtained from him a sum of 500*l.*, and that the grantor continued to reside on the premises until his death. The validity of this grant was contested by the heir-at-law of the grantor, in an action of ejectment brought against him for the recovery of the property, on the ground of the suspicious character of the transaction, which he contended to be a fraud upon the statute of charitable uses, 9 Geo. 2, c. 36. At the trial, the judge withdrew from the jury the question of fraud; holding that it was not competent to the heir-at-law to question the validity of the deed of his ancestor:—Held, that this was a misdirection. *Doe d. Williams v. Lloyd*, 93.

CHARITY-ESTATES.

Administration of, in whom vested.

The administration of the charity-estates and funds comprised in and described by the 5 & 6 Will. 4, c. 76, s. 71, did not continue, after the 1st August, 1836, in the persons described in that section, though no subsequent act passed respecting the same, and no vacancy had been occasioned amongst such persons, before that time. *Bignold v. Springfield*, 101.

CHARTERPARTY.

See SHIPPING.

CO-CONTRACTOR.

See EVIDENCE, II., 2.

CONSCIENCE, COURTS OF.

See INFERIOR COURTS.

CONTRACT.

For a Purpose prohibited by Law.

1. A court of law will not lend its aid to enforce the performance of a contract between parties, which ap-

pears upon the face of the record, to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. *Gas Light Co. v. Turner*, 609.

2. In covenant for non-payment of rent, the defendant pleaded that the indenture was made between the plaintiffs and himself, and the premises demised by them to him, *for the express purpose* of being used for and applied by the defendant to a use prohibited under a penalty by the building act, 25 Geo. 3, c. 77:—Held, that the plea was a good answer to the action. *Ib.*

CONVERSION.

See TROVER.

COSTS.

I. On Motions, &c. under the Interpleader Act.

1. The defendant being sued for arrears of rent, and having received notice from one claiming to be entitled as mortgagee of the premises not to pay the rent to the plaintiff, obtained a rule under the 1st section of the interpleader act. The claimant not appearing to maintain his claim, the court ordered that the claim should be barred, and that the plaintiff and defendant respectively should each bear his own costs of the rule—the proceedings in the action being stayed on payment by the defendant of the rent and costs. *Murdock v. Taylor*, 604.

2. Upon an issue under the 1st section of the interpleader act, the plaintiff claimed 183*l.* for work and labour, &c., and recovered 50*l.* A judge at chambers having made an order directing that each party should pay his own costs of the cause and issue, and of all applications and proceedings in

and connected with the cause and issue, the court declined to interfere. *Kerr v. Edwards*, 337.

II. *Under Court of Conscience Acts.*

1. To entitle a defendant to a suggestion for double costs under the Middlesex court of conscience act, 23 Geo. 2, c. 33, s. 19, his affidavit need not shew affirmatively that the cause of action arose within the jurisdiction: it is enough, the contrary not appearing, if the affidavit state that the defendant at the time of bringing the action resided within the jurisdiction, and was liable to be summoned to the local court. *Bishop v. Marsh*, 128.

2. The statute applies to causes tried before the sheriff. *Ib.*

3. Though attornies plaintiffs are not within the act, their personal representatives are. *Ib.*

4. A suggestion may be entered under this statute in the case of executors or administrators suing in a superior court for a debt (recoverable in the Middlesex county court) due to their testator or intestate. *Ib.*

III. *Taxation of.*

1. To a declaration for slander, the defendants pleaded not guilty and a justification: a verdict having been found for the defendants on the first plea, and for the plaintiff on the second:—Held, that the plaintiff was entitled to costs upon the second issue, the statute 21 Jac. 1, c. 16, s. 6, applying only to the case of frivolous actions of slander, where the jury have decided affirmatively by their verdict that the plaintiff is entitled to less damages than 40s., and not to a case where there has been no assessment of damages. *Skinner v. Shoppee*, 275.

2. The Master having on taxation allowed the plaintiff the expenses of a

witness, who was brought from France for the purpose of proving that the tenant in tail (upon whose will the question arose) died unmarried and without issue, the briefs shewing that he would have proved these facts, had not the course the cause took rendered such proof unnecessary—The court refused to send the matter back to him. *Stert v. Platel*, 397.

3. In an action by executors for money alleged to have been paid by them to the use of the defendant, the latter, being advised that the probate of the will of the testatrix was essential to his defence, called upon the plaintiff's attorney for a *written* undertaking to produce it at the trial: the latter refusing to give such undertaking, the defendant's attorney procured an *exemplification*:—Held, that he was not entitled, on taxation, to the expense of obtaining it. *Goldstone v. Tovey*, 562.

IV. *Security for Costs.*

The court refused to compel the plaintiff to give security for costs, upon an affidavit that he had been bankrupt and thrice discharged under the insolvent debtors' act; and that he was suing as trustee for a third person who alone was beneficially interested in the subject-matter of the action. *Wray v. Brown*, 557.

COUNTY COURT.

See INFERIOR COURTS.

COURTS OF CONSCIENCE.

See INFERIOR COURTS.

DAMAGES.

The second count of the declaration stated that the plaintiffs were possessed of a vault and of certain wine therein; that the defendant was about to pull down and remove, and did pull down

and remove, certain other vaults and walls next adjoining the plaintiffs' vault; and thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' vault, to give due and reasonable notice to the plaintiffs of his intention to pull down and remove the said vaults and walls so adjoining the plaintiffs' vault before he pulled down the same, so as to enable the plaintiffs to protect themselves; and also to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and removing his vaults and walls, so that for want of such care, skill, and precaution, the plaintiffs' vault and its contents might not be damaged or destroyed.

General damages having been given upon the whole declaration;—Held, that the allegation as to the want of notice could not be rejected, and the damages ascribed to the rest of the declaration, even if good. *Chadwick v. Trower*, 1.

DECEIT.

See CASE, IV.

DEMISE.

See LEASE.

DEVISE.

Construction of.

1. Testator devised lands to G. A. for life, remainder to the use of all and every the child and children of G. A., *other than and except an eldest or only son*, and their heirs, &c., for ever; and if there should be but one such child, other than and except as aforesaid, to the use of such only child, and his heirs; and, if there should be no such child or children other than an elder or only son, or, being such, all should die under the age of twenty-one, then over.

At the time of testator's death G. A. had two sons—G. A. A., and J. P. A.: the first of these died in the lifetime of G. A., the second survived him:—Held, that J. P., on his father's death, took an estate in fee-simple in possession, defeasible in the event of his dying under the age of twenty-one. *Adams v. Bush*, 405.

2. Testator, possessed of freehold property, by his will desired his executors to purchase out of such monies belonging to him as might come to their hands, two annuities to be paid by them to certain parties named; and he concluded as follows:—"And, with regard to *all the rest of my property, of what kind soever*, I do hereby desire my executors, *after payment of my just and lawful debts* and funeral expenses, to pay and *make over* the whole to my daughter, M. D. B., and to the children of my said daughter *after her decease*:—Held, that the executors took no *interest* in the freehold property; but a *power* to settle the same upon the testator's daughter for life, with remainder, after her decease, to her children in tail. *Knocker v. Bunbury*, 414.

3. The testatrix, being seized of a mansion called Kesgrave House, with lands adjoining situate in the several parishes of Kesgrave, Little Bealings, and Playford, in the county of Suffolk, by her will, wherein she described herself as of "Kesgrave House, in the county of Suffolk," devised to trustees "all and singular her freehold messuage or tenement, lands and hereditaments, *situate at Kesgrave aforesaid* (and two sets of chambers in Grays' Inn), with the appurtenances thereto respectively belonging," upon certain trusts: and, after giving certain specific and pecuniary legacies, as to "all the residue of her *estate and effects* where-soever and whatsoever," gave and be-

queathed the same to the trustees, in trust for her sons—declaring that the shares of her said sons should be held upon such trusts and with and under such powers and restrictions as were before declared with respect to a sum given to her son John; which trusts were applicable only to personalty:—Held, that the lands in Little Bealings and Playford did not pass to the trustees either under the particular devise, or under the bequest of the residue. *Pogson v. Thomas*, 621.

EJECTMENT.

I. *Intituling Declaration.*

An error in the title of a declaration in ejectment, such as, intituling it of a term not yet arrived, will not disable the lessor of the plaintiff from moving for judgment, even though the notice *has no date*. *Doe d. Greene v. Roe*, 385.

II. *Service of Declaration and Notice.*

1. On a motion for judgment against the casual ejector, where the service is upon a servant, the affidavit must shew an acknowledgment by the tenant that the declaration and notice came to his hands before the term, but it need not shew *when the acknowledgment was made*. *Doe d. Durrant v. Roe*, 459.

2. The court refused to allow judgment to be signed against the casual ejector (in an action to recover a piece of land taken in by road commissioners), upon an affidavit of service on one of the commissioners, and upon their clerk. *Doe d. White v. Roe*, 146.

3. Service of a declaration and notice in ejectment on a broker with whom the key of the premises had been left by the tenant, who had absconded, and affixing a copy on the door of the house:—Held, good service. *Doe d. Scott v. Roe*, 468.

4. Where the declaration and notice in ejectment had been served personally upon all but one of several tenants of adjoining cottages, and as to that one a copy affixed on the door, the court granted a rule nisi for judgment against the casual ejector—instead of (as formerly) leaving the lessor of the plaintiff to proceed under the statute as for a vacant possession. *Doe d. Timothy v. Roe*, 126.

III. *Motion for Judgment, when made.*

Where a term has been allowed to elapse between the service of the declaration in ejectment and the motion for judgment, the rule for judgment, *in this Court*, is nisi only. *Doe d. Mus-selwhite v. Roe*, 471.

ESTOPPEL.

1. One Boileau, who had in 1832, been admitted for life by the benchers of the Society of Lincoln's Inn (the owners of the fee), to certain chambers in that inn, by indenture of July, 1833, reciting that he was "seised or well entitled for an estate for his own life in or to the said chambers," &c., conveyed them to the lessor of the plaintiff, to secure an annuity; and in Michaelmas Term in the same year surrendered them to the Society with a view to the admission thereto of the defendant, who was accordingly let into possession:—Held, that, inasmuch as the defendant did not claim by, through, or under Boileau, he was not estopped by the recital in the deed of July, 1833, from denying that Boileau had a life estate in the premises. *Doe d. Marchant v. Errington*, 210.

2. Where a lease purports to be made under a power contained in a will, the lessee is estopped by his execution of the counterpart from denying the exe-

cution of the will. *Bringloe v. Goodson*, 71.

EVIDENCE.

I. *What admissible.*

1. In trover against assignees for goods claimed by them as belonging to the bankrupt, or as being in his order and disposition at the time of his bankruptcy, with the consent of the true owner, the defendants offered in evidence declarations made by the bankrupt before his bankruptcy, as to the goods in question, in the absence of the plaintiff, in order to shew an exercise of dominion over them as owner. This evidence having been rejected, and the jury having found for the plaintiff—the court sent the cause down to a new trial. *Sharp v. Newsholme*, 21.

2. In trover by the assignees of bankrupts to recover the value of goods alleged to have been delivered to the defendants in contemplation of bankruptcy, evidence that the goods were delivered in payment and satisfaction of a debt due from the bankrupts to the defendants, does not support a plea alleging that the goods were *bonâ fide* sold and delivered to the defendants by the bankrupts before the issuing of a fiat and without notice of an act of bankruptcy, and that the defendants *bonâ fide* paid for them. *Backhouse v. Jones*, 148.

3. Evidence that other creditors of the bankrupts to whom goods had been delivered under similar circumstances, had subsequently given them up to the assignees or paid their value:—Held, irrelevant and inadmissible. *Ib.*

4. In trespass for breaking and entering the plaintiff's close, and carrying away hay, the defendants pleaded that the alleged trespasses were committed by them jointly with one C.,

and that afterwards certain disputes were pending between C. and the plaintiff concerning claims of C. against the plaintiff in respect inter alia of the farm occupied by him under the plaintiff, and concerning claims by the plaintiff against C. *in respect of the causes of action in the declaration mentioned*, and that the plaintiff then agreed to release C. from all claims, and did accordingly relinquish all claim against him *in respect of the said causes of action*:—Held, that this plea was sustained by proof of an agreement whereby the plaintiff, in consideration that C. (who had been tenant of a farm under the plaintiff, and had held over the same under colour of a claim for improvements) acknowledged that he had no claim against the plaintiff, the plaintiff “relinquished all claims against C. *for mesne profits* and rent, or for holding over”—the action being substantially an action for mesne profits. *Hey v. Moorhouse*, 156.

5. The plaintiff declared in case against the defendants, accountants, alleging negligence in the making out accounts in which he and his two partners were interested, in consequence of which the plaintiff sustained damage:—Held, that evidence that the defendants were retained and employed by the firm sustained an allegation of a retainer and employment by the plaintiff. *Story v. Richardson*, 291.

II. *Competency of Witness.*

1. A rated inhabitant of the district or parish for which a highway-rate is made, is a competent witness to support it. *Morrell v. Martin*, 688.

2. In an action brought by the plaintiff to recover wages alleged to be due to him as secretary of an intended joint-stock banking company, against the defendant, one of the provisional

committee:—Held, that another member of the committee was a competent witness for the defendant, after a release from him. *Beckett v. Wood*, 713.

III. *Contract in Writing.*

1. In an action against a carrier for negligence in the conveyance of goods by water, whereby they became wetted and spoiled, it appeared that the goods were put on board the defendant's boat under one entire contract for their conveyance from Boston to Leeds, one half to be delivered there, the other to be conveyed to and delivered at Bradford. At the trial, the plaintiff proved the contract and its execution by oral testimony; but, it appearing from the examination of one of his witnesses, that, at the time of the receipt of the goods by the defendant, two notes were delivered by him to the plaintiff (each applying to a moiety of the goods), which ascertained the destination of the goods, and the terms upon which they were to be carried, and only one of these being produced, and the absence of the other not satisfactorily accounted for:—Held, that this was ground of nonsuit. *Thompson v. Travis*, 85.

2. Premises were held by a tenant according to certain written rules, but the length of the term was agreed by parol:—Held, that, in trespass by the landlord against third persons, it was not necessary to produce the written rules, to shew that the term had ended. *Hey v. Moorhouse*, 156.

IV. *Of Hand-writing.*

In an action against the acceptor of a bill of exchange, the only proof of the hand-writing of the defendant was that of a banker's clerk, who stated, that, two years ago, he saw a person calling himself by the defendant's name

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sign a book, that he had never seen him since, but that he thought the hand-writing was the same, and had since seen cheques bearing the same signature:—Held, that this was evidence to go to the jury. *Warren v. Anderson*, 384.

And see LIBEL.

EXECUTION.

See PRACTICE, IX.

EXECUTORS AND ADMINISTRATORS.

Though attorneys plaintiffs are not within the Middlesex court of conscience act, 23 Geo. 2, c. 33, s. 19, their personal representatives are. *Bishop v. Marsh*, 128.

FALSE IMPRISONMENT.

See CASE, III., 1, 2.

FALSE REPRESENTATION.

See CASE, IV.

FIXTURES.

See LANDLORD AND TENANT.

FREEMAN.

See BYE-LAW.

FRENCH FISHERY.

See INSURANCE.

GUARANTIE.

Construction of.

By a guarantie the defendant engaged to pay to the plaintiff any debt due to him from the defendant's son, not exceeding 600*l.*, provided, that, before the defendant was called on in pur-

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suance of the guarantie, the plaintiff should avail himself to the uttermost of any bonâ fide securities he held of the son; provided also, that, in case any thing should prevent the defendant from receiving and retaining the proceeds of an execution he had levied on *his son's property*, the guarantie should be void:—Held, that the plaintiff's neglecting to adopt means to enforce payment of a bill by a party who was proved to be totally insolvent, and to have been three years and a half in gaol, where he continued, was not a breach of the condition upon which the guarantie was given:—Held also, that the circumstance of a portion of the property seized, which turned out not to be the property of the defendant's son, being afterwards recovered by the owner, neither avoided the guarantie, nor afforded ground for diminishing the amount of the defendant's liability thereon. *Muskett v. Rogers*, 51.

HABEAS CORPUS.

See PRACTICE, X.

HIGHWAY RATE.

I. *Demand of.*

A demand of a highway-rate by one of two surveyors acting under the 5 & 6 Will. 4, c. 50, is a valid demand. *Morrell v. Martin*, 688.

II. *Evidence to support.*

A rated inhabitant of the district or parish for which the rate is made is a competent witness to support it. *Morrell v. Martin*, 688.

ILLEGAL CONTRACT.

See CONTRACT.

INDORSEMENT.

Of defendant's addition on process, not necessary in *C. P. Brown v. Hudson*, 324.

INFERIOR COURTS.

Middlesex County Court.

1. To entitle a defendant to a suggestion for double costs under the Middlesex court of conscience act, 23 Geo. 2, c. 33, s. 19, his affidavit need not shew affirmatively that the cause of action arose within the jurisdiction: it is enough, the contrary not appearing, if the affidavit state that the defendant at the time of bringing the action resided within the jurisdiction, and was liable to be summoned to the local court. *Bishop v. Marsh*, 128.

2. The statute applies to causes tried before the sheriff. *Ib.*

3. Though attorneys plaintiffs are not within the act, their personal representatives are. *Ib.*

4. A suggestion may be entered under this statute in the case of executors or administrators suing in a superior court for a debt (recoverable in the Middlesex county court) due to their testator or intestate. *Ib.*

INSOLVENT DEBTOR.

Discharge.

After judgment and outlawry of the defendant, he rendered in discharge of his bail, and afterwards obtained his discharge under the insolvent debtors act, subject to an imprisonment of four months at the suit of one of his creditors. Whilst he was in custody pursuant to this adjudication, the plaintiff in this action obtained a habeas corpus in order to bring him up to be charged in execution on the judgment in outlawry. The Warden's return merely re-

cited the fact of the defendant having been outlawed, but did not allege it as a ground of his detention:—Held, that there was nothing upon which he could be charged in execution. *Adcock v. Fiske*, 138.

INSURANCE.

Insurable Interest.

1. By a law of France relating to the whale fishery, it is provided that "the vessel which shall have fished either in the Pacific Ocean by doubling Cape Horn or by passing through the Straits of Magellan, or to the south of Cape Horn at 62 degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back, in the produce of its fishery, one half at least of its burthen, or if it can prove a navigation of sixteen months at least:"—Held, that, to entitle a vessel (which had not performed a navigation of sixteen months) to the benefit of this provision, it is necessary that some part at least of the produce of her fishing should be taken in the fishing latitudes pointed out by the law. *Devaux v. Steele*, 637.

2. Supposing the bounty not to be payable as a matter of right, under the strict interpretation of the law:—Held, that the chance of receiving this bounty on her return, founded upon an alleged invariable course and practice of the French government in its administration, though almost amounting to a moral certainty, did not constitute an insurable interest. *Ib.*

INTERPLEADER.

I. Amendment of Order under the Interpleader Act.

The court amended an order made by a judge at chambers under the in-

terpleader act, at the instance of the execution-creditor; but directed the latter to pay the costs of all the parties who had appeared to oppose the rule nisi, with the exception of the sheriff. *Tilleard v. Cave*, 511.

II. Costs of Motions, &c. under.

1. The defendant being sued for arrears of rent, and having received notice from one claiming to be entitled as mortgagee of the premises not to pay the rent to the plaintiffs, obtained a rule under the 1st section of the interpleader act. The claimant not appearing to maintain his claim, the court ordered that the claim should be barred, and that the plaintiff and defendant respectively should each bear his own costs of the rule—the proceedings in the action being stayed on payment by the defendant of the rent and costs. *Murdock v. Taylor*, 604.

2. Upon an issue under the 1st section of the interpleader act the plaintiff claimed 183*l.* for work and labour &c., and recovered 50*l.* A judge at chambers having made an order directing that each party should pay his own costs of the cause and issue and of all applications and proceedings in and connected with the cause and issue—The court declined to interfere. *Kerr v. Edwards*, 337.

JOINT STOCK BANK.

Execution against Members of.

The mode of proceeding under the 7 Geo. 4, c. 46, s. 13, to obtain execution against the members of a joint-stock banking company upon a judgment in an action brought against the public officer of the company for the time being, is by *scire facias*, not by suggestion. *Whittenbury v. Law*, 661.

JUDGMENT,

As in Case of a Nonsuit—See PRACTICE,
VII.

LANDLORD AND TENANT.

I. *Tenancy.*

1. One C. rented a farm under the plaintiff, his term in which expired on the 1st February, 1838. On the 2nd February, the plaintiff's agent demanded possession of the land; but C. refused to quit unless paid for certain improvements. The plaintiff thereupon brought an ejectment, and obtained actual possession on the 16th July:—Held, that the demand of possession on the 2nd February, gave the plaintiff such a constructive possession as to enable him to maintain trespass against third persons for coming on the land and carrying off the crops. *Hey v. Moorhouse*, 156.

2. The premises were held by C. according to certain written rules, but the length of the term was agreed by parol:—Held, that, in trespass by the landlord against third persons, it was not necessary to produce the written rules, to shew that the term had ended. *Ib.*

II. *Fixtures.*

The defendant's testator was the surviving lessee, under a renewed lease, of certain salt-works, which renewed lease recited the former lease, and also the fact that the lessees "had erected and set up divers engines, machines, roads, and other conveniences, as well for the use and the convenience as for the managing and carrying on at, in, or upon the said demised premises the trade or business of rock-salt or salt-rock getters and refiners, or manufacturers of white salt," and contained a demise of "all and every the messuages, dwelling-

houses, wick-houses, salt-works, erections, buildings, and other matters and things since made at, in, or upon or under the said demised premises for the use and convenience of carrying on the said demised trades," and a covenant by the lessees to keep and maintain in good and sufficient repair "the buildings, kays, and works then standing and being on the premises, and all and every other such edifices and engines as should be at any time during the term erected, set up, built, or made in or upon the demised premises," and, at the determination of the term, to deliver up "all the premises mentioned to be thereby demised, and all such buildings, kays, works, edifices, and engines, in good and complete repair and condition:"—Held, that salt-pans in which the brine was manufactured into salt, and pipes by which the brine was conveyed from the salt springs to the brine-pits—the salt-pans being made of plates of iron, supported upon brick-work, and having rings on their sides by which they were lifted off to be repaired—the pipes being metal pipes, partly carried under ground and partly along troughs supported by tressels—were not removable by the lessees at the expiration of the term. *Earl Mansfield v. Blackburne*, 720.

LEASE.

Farming Covenants.

1. A lease granted by virtue of a power enabling tenant for life to make leases without impeachment of waste, contained a proviso that the tenant should pay a further rent of 10*l.* per acre for ploughing up pasture land or for managing the farm contrary to the covenants. In an action to recover the penalty, a motion in arrest of judgment on the ground that this amounted to a

license to commit waste, was disallowed. *Bringloe v. Goodson*, 71.

2. *Quere* whether the above reservation was a *rent* or a *penalty*? *Ib.*

3. Where a lease purports to be made under a power contained in a will, the lessee is estopped by his execution of the counterpart from denying the execution of the will. *Ib.*

And see LANDLORD AND TENANT, II.

LIBEL.

What actionable.

1. To publish of a master-mariner and ship-owner that his vessel (which is advertized for the conveyance of goods on freight and passengers to Calcutta) is unseaworthy and has been sold for a convict ship, is a personal libel on him in the way of his business, for which he may maintain an action without alleging special damage or proving malice. *Ingram v. Lawson*, 471.

2. In an action for a libel imputing to a vessel advertizing for passengers and freights for the East Indies, and to her master and owner (the plaintiff), that she is unseaworthy and in other respects unfit for the purpose:—Held, that evidence of the ordinary profits of such a voyage was receivable, and that the jury were properly told that they might take such evidence into their consideration in estimating the probable amount of damage sustained by the plaintiff from the publication of the libel—although the action was brought before the commencement of the intended voyage. *Ib.*

3. An alien amy, though he has never been in this country, may maintain an action for a libel published in this country. *Pisani v. Lawson*, 182.

LIVERYMAN.

See BYE-LAW.

MALICIOUS PROSECUTION.

See CASE, III.

MEMORANDA.

I. *Judges.*

Death of Mr. Justice Vaughan, 127.

Removal of Mr. Baron Maule to this court. *Ib.*

Sir R. M. Rolfe created a Baron of the Court of Exchequer, 127.

II. *Solicitor-General.*

Mr. Serjeant Wilde appointed Solicitor-General, 127; knighted, 404.

III. *Queen's Counsel.*

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George James Turner, Esq., of Lincoln's Inn, *Ib.*

David Dundas, Esq., of the Inner Temple, *Ib.*

Richard Bethell, Esq., of the Middle Temple, *Ib.*

IV. *Patents of Precedence.*

Serjeants Adams, Andrews, Storks, Ludlow, Bompas, Goulburn, and Talfourd, 404.

MESNE PROFITS.

See EVIDENCE, I., 4.

MIDDLESEX COUNTY COURT.

See INFERIOR COURTS.

MISDIRECTION.

An aged clergyman of the Established Church, under the influence of certain ministers of the Wesleyan Society, two years before his death conveyed to trustees for that society the

during the progress of the work; but no definite share in the concern was allotted to him, nor was there any *express* contract between him and W. as to a partnership, until the 15th October, 1833, when an agreement was entered into between them, to the effect that the market should be valued by a surveyor, and that the defendant should be interested in a seventh share. Profits had been made of the market prior to the date of the agreement, but had not been accounted for to the defendant; nor had he received any interest upon the sums advanced by him:—Held, that the defendant was not a partner until the 15th October, 1833, and consequently was not responsible to the builder for work done before that day. *Howell v. Brodie*, 372.

PAYMENT.

See PLEADING, III., 2.

PEERAGE.

See TREASON.

PENALTY.

See LEASE, 2.

PLEADING.

I. *Declarations.*

1. The plaintiff was arrested at the suit of one B., and gave bail to the sheriff. The defendant, who was B.'s attorney, influenced partly by a desire to serve one of the bail, and partly by a notion that the bail was not responsible, by working upon the apprehensions of his family, induced him to sign a paper authorizing him (the defendant) to *decline on his behalf to justify as bail*. This paper the defendant sent to

his agent, for the purpose of doing what was necessary upon it. The agent having accidentally permitted the justification to take place, with a view to cure the defect, *obtained a judge's order to render the plaintiff in discharge of his bail*. The order was sent to the defendant, who caused the plaintiff to be taken upon it, and conveyed to goal, where he remained about three weeks. In an action on the case, the declaration charged that the defendant wrongfully, injuriously, and *maliciously*, and without the authority of the bail, caused the plaintiff to be rendered:—Held, that *malice* was necessarily averred, and must be proved; and, the jury having negatived *malice*, the court refused to grant a new trial. *Porter v. Weston*, 25.

2. By a charterparty the defendant engaged to provide a cargo for the vessel at Marseilles for London, and to pay freight and charges on delivery there, one half in cash, and the remainder by an approved bill at three months' date. In an action on this charterparty, the plaintiff assigned for breach that the defendant did not provide a cargo, whereby the plaintiff lost profits, and was put to charges in procuring other freight for the homeward voyage; and that the defendant had not paid the money or given the bill in the charterparty mentioned. The jury having given general damages:—Held, on motion in arrest of judgment, that this was in substance but *one* breach. *Hoggett v. Exley*, 480.

3. By a guarantie the defendant engaged to pay to the plaintiff any debt due to him from the defendant's son, not exceeding 600*l.*, provided, that, before the defendant was called on in pursuance of the guarantie, the plaintiff should avail himself to the uttermost of any *bonâ fide* securities he held of the

son; provided also, that, in case any thing should prevent the defendant from receiving and retaining the proceeds of an execution he had levied on *his son's property*, the guarantie should be void:—Held, that the absence of an averment in the declaration that certain securities of which the plaintiff was therein alleged to have availed himself, were *all* the securities he held of the defendant's son, was no ground for arresting the judgment. *Muskett v. Rogers*, 51.

II. *Pleas in Abatement.*

Non-joinder of Co-Contractors.

1. In an action against three defendants for work and labour, for money paid, and for money due upon an account stated, the defendants pleaded in abatement, to the whole declaration, that the promises were made by them jointly with one M. A. G. It appeared that the plaintiff had no cause of action against the three defendants jointly, but a demand to a small amount against *one*, another demand against the *three* jointly with M. A. G., another against *two* of the defendants jointly with M. A. G., and another against *two* of the defendants only:—Held, that the defendants were entitled to judgment. *Hill v. White*, 245.

2. To assumpsit for work and labour, &c., the defendants pleaded that the promises in the declaration mentioned were made by them jointly with nine others, naming them. The evidence was, that work to the amount of 5*l.* was done for the defendants alone, and that a balance of 6*l.* 5*s.* was due for work done for the defendants and the other persons named in the plea:—Held, that the evidence did not sustain the plea, and that the plaintiff was entitled to a verdict for 11*l.* 5*s.* *Hill v. White & Williams*, 249.

III. 1. *Set-off. Pleas in Bar.*

1. F. and H., attorneys, sued the defendants for work and labour; the defendants pleaded a set-off for money received by F. before H. became a member of the firm:—Held, that the plea was no answer to the action, notwithstanding F. had after the commencement of the partnership admitted the receipt of the money. *France v. White*, 257.

2. *Payment in Satisfaction.*

2. The plaintiff declared, that, on the 1st February, 1837, the defendant was indebted to him in 40*l.* for the hire of horses, 40*l.* for the hire of carriages, and 40*l.* upon an account stated; the defendant pleaded, as to all the demands except 16*l.* 8*s.*, that, *after* the making of the several contracts in the declaration mentioned, to wit, on the 12th October, 1827, he paid the defendant divers sums of money amounting in the whole to all the monies in the declaration mentioned, except as aforesaid, and the plaintiff accepted and received the same in full satisfaction:—Held, that the plea was good in form, though pleaded thus generally, and the particular date of the payments was alleged (under a *videlicet*) to have been *before* the day laid in the declaration. *Beeley v. Dolley*, 243.

3. *Excuse for Absence of Notice of Dis-honour*—*See* *BILLS OF EXCHANGE*, IV.

IV. *Adding Plea*—*see* *PRACTICE*, IV.

POULTERS' COMPANY.

See *BYE-LAWS*.

POWER.

See *LEASE*, 1.

PRACTICE.

I. *Process.*

It is not necessary in this court to indorse on a writ of ca. sa. the *addition* of the defendant: the rule of 2 & 3 Geo. 4, requiring such indorsement, applying only to the court of Queen's Bench. *Brown v. Hudson*, 324.

II. *Amendment of Declaration, &c.*

See AMENDMENT.

III. *Pleading several Matters.*

1. By a railway act it was provided, that, in any action to be brought by the company against any proprietor of any shares in the undertaking, to recover money due for calls, *it should be sufficient for the company to declare that the defendant, being a proprietor of a share, or so many shares, was indebted to the company in so much as the calls in arrear should amount to, for a call, or so many calls &c., without setting forth the special matter; and that, on the trial, it should only be necessary to prove that the defendant at the time of making the calls was a proprietor of such share or shares as the action was brought in respect of, and that such notice was given as was directed by the act of such call or calls having been made, &c.*; the clause then went on to define the requisite proof of proprietorship. In an action for calls, the court allowed the defendant to plead—that he was never indebted, and *that he was not a proprietor*—but refused to allow him also to plead—that notice of the making of the calls was not given in the manner required by the act—that no time or place was appointed for payment of the calls—that the calls were made to defray the expense of unauthorized deviations—and that, at the time the calls were made, there were not in the company the number

of shares directed by the act. *Brighton Railway Co. v. Wilson*; *Same v. Fairclough*, 347.

2. By a railway act it was provided, that, in any action to be brought by the company against any proprietor of any shares in the undertaking, to recover money due for calls, *it should be sufficient for the company to declare that the defendant, being a proprietor of a share, or so many shares, was indebted to the company in so much as the calls in arrear should amount to, for a call, or so many calls &c., without setting forth the special matter; and that, on the trial, it should only be necessary to prove that the defendant, at the time of making the calls, was a proprietor of such share or shares as the action was brought in respect of, and that such notice was given as was directed by the act of such call or calls having been made, &c.*: the clause then went on to define the requisite proof of proprietorship. In an action for calls, the court refused to allow the defendant to plead, in addition to never indebted, and that he was not a proprietor—that he had forfeited his shares, and received notice of such forfeiture, before the making of the calls in question—and that he had forfeited his shares and ceased to be a proprietor after the making of the calls and before the commencement of the action. *Brighton Railway Co. v. Fairclough*, 540.

IV. *Adding Pleas.*

The defendants, contractors employed by the commissioners of sewers, having under the direction of the commissioners obstructed a watercourse which the plaintiffs claimed a right to navigate, the latter brought an action, which was defended by the commissioners, who by their pleas denied the obstruction and also traversed the right claimed by the plaintiffs. After several abortive at-

tempts at a reference, the commissioners applied for leave to add a plea which would furnish an answer to the plaintiffs' ground of action. The court refused to grant such leave, unless the commissioners would abide by a tender of compensation made by them before the commencement of the action in 1835. *Medley v. Pritchard*, 684.

V. *Setting aside and staying Proceedings.*

A judge at chambers having set aside a plea on the ground that it was palpably a sham plea, and evidently designed to perplex and delay the plaintiff—the court refused to discharge the order. *Balmanno v. Thompson*, 306.

VI. *Signing Judgment.*

The plaintiff having undertaken not to sign judgment until a four days' further demand of plea, the defendant (no plea having been demanded) pleaded two pleas without a rule to plead double, and ruled the plaintiff to reply; whereupon the plaintiff signed judgment:—Held, that the judgment was regular. *Gould v. Whitehead*, 340.

VII. *Judgment as in Case of a Nonsuit.*

In Michaelmas Term 1835, the plaintiff demurred to one of the defendant's pleas, and issues in fact were joined upon the rest of the record. The plaintiff never having demanded a joinder in demurrer, or taken any step in the cause, the defendant in January, 1840, obtained a judge's order to withdraw the plea that had been demurred to, and in this term moved for judgment as in case of a nonsuit:—Held, that there had been no default. *Gordon v. Smith*, 560.

VIII. *New Trial—where Cause called on, out of its Turn.*

A cause standing tenth in the written list at Nisi Prius, in which counsel had

been instructed for the defendant, was at the instance of the plaintiff's counsel called on at the sitting of the court as an undefended cause, without any notice to the defendant, and a verdict was taken for the plaintiffs. The court set aside the verdict, and granted a new trial, *without an affidavit of merits*—the costs to abide the event. *Dorrien v. Howell*, 508.

IX. *Execution.*

The defendant was taken in execution on a judgment entered up on a warrant of attorney which had been given by him jointly with another who had previously been taken in execution on a judgment for a larger sum, including that secured by the warrant of attorney:—Held, regular. *Bircham v. Tucker*, 469.

X. *Charging Prisoner.*

After judgment and outlawry of the defendant, he rendered in discharge of his bail, and afterwards obtained his discharge under the insolvent debtors act, subject to an imprisonment of four months at the suit of one of his creditors. Whilst he was in custody pursuant to this adjudication, the plaintiff in this action obtained a habeas corpus in order to bring him up to be charged in execution on the judgment in outlawry. The Warden's return merely recited the fact of the defendant having been outlawed, but did not allege it as a ground of his detention:—Held, that there was nothing upon which he could be charged in execution. *Adcock v. Fiske*, 136.

PROBABLE CAUSE.

See CASE, III., 2.

PROMISSORY NOTE.

See BILLS ON EXCHANGE.

PROMOTIONS.

See MEMORANDA.

PUBLIC OFFICER.

See JOINT STOCK BANK.

RECITALS.

See LEASE, 3.

RENT.

See LEASE, 1, 2.

REQUESTS, COURTS OF.

See INFERIOR COURTS.

SALT-PANS.

See LANDLORD AND TENANT, II.

SECURITY FOR COSTS.

See COSTS, IV.

SERJEANTS.

1. Exclusive privilege of the Serjeants. 430—453.

2. To entitle them to be heard in old causes, members of the outer bar must have been actually *engaged*, not merely *retained*, prior to the 20th January, 1840. 452.

SET-OFF.

1. F. and H., attorneys, sued the defendants for work and labour; the defendants pleaded a set-off for money received by F. before H. became a member of the firm:—Held, that the plea was no answer to the action, notwithstanding F. had after the commencement of the partnership admitted the receipt of the money! *Francis v. White*, 257.

2. To an action at the suit of assign-

nees of a bankrupt for 48*l.*, the price of a phaeton which the defendant had purchased from the bankrupt for *cash on delivery*, the defendant pleaded, that, before and at the time of the delivery of the phaeton, and of the bankruptcy, the bankrupt was indebted to the defendant in the sum of 48*l.* upon a bill of exchange drawn by one Eives upon and accepted by the bankrupt, payable to one Harland, and by Harland indorsed to the defendant: the plaintiffs replied that the bankrupt had accepted the bill for a debt due from him to Harland, and that, after the bill became due and was dishonoured, Harland indorsed it to the defendant without consideration, in order that the defendant might purchase the phaeton, setting off the amount of the bill, and then hand over the phaeton to Harland:—Held, on special demurrer, that the replication was a good answer to the claim of set-off. *Lackington v. Combes*, 312.

SHAM PLEA.

See PRACTICE, V.

SHERIFF.

1. *Trotter* lies not at the suit of assignees against the sheriff for seizing and selling, under an execution issued upon a judgment founded on a warrant of attorney as to which the directions of the 3 Geo. 4, c. 39, s. 1, have not been complied with, the goods of a party who had not at the time of such seizure and sale committed an act of bankruptcy. *Brook v. Mitchell*, 739.

2. Whether money had and received or a special action on the case would lie, *quære*? *Ib.*

SHERIFF'S COURT.

The provisions of the Middlesex county court act, 23 Geo. 2, c. 33, s. 19,

as to entering a suggestion for double costs, apply to causes tried before the sheriff. *Bishop v. Marsh*, 128.

SHIPPING.

Construction of Charterparty.

By a charterparty it was stipulated that the ship should receive on board a cargo in the London docks, and proceed therewith to Bombay and there discharge the same, and should then load a full and complete cargo, with which she should proceed direct to London, in consideration of a certain gross freight. The charterparty further contained the following stipulations—"the merchants to have the privilege of sending the ship to Calcutta from Bombay, they paying at the rate of 17*s.* per register ton per month for the extra time occupied," and "also port-charges and pilotage at Calcutta;" and that, "if the ship returned from Bombay direct to London, the merchants to have the power of sending her to one port on the Malabar coast to receive cargo," paying as before for the extra time:—Held, that the owners, having discharged the outward cargo at Bombay, were not bound to take on board a cargo *for delivery at Calcutta*. *Cockburn v. Wright*, 489.

And see PLEADING, L, 2.

STATUTES.

Table of—Post, p. 785.

SUGGESTION.

For double Costs under Court of Conscience Acts—See INFERIOR COURTS.

SURVEYOR OF HIGHWAYS.

See HIGHWAY-RATE.

TENDER.

In an action for the breach of an agreement to let a house to the plaintiff for one year from the 25th March, the plaintiff to take the fixtures at a valuation, and to pay for the same on entry:—Held, that the plaintiff was not precluded from giving evidence of a tender of the price of the fixtures and demand of possession at a day subsequent to the 25th March. *Edman v. Allen*, 261.

TITLE.

See VENDOR AND PURCHASER.

TREASON.

During the abeyance of a barony descendible to heirs of the body, one of the co-heirs was attainted for treason: an act of parliament afterwards passed to restore in blood the sons and daughters of the attainted co-heir:—Held, that it was competent to the Crown to determine the abeyance in favour either of a party claiming through the co-heir who was so attainted, or of one claiming through another co-heir. *Braye and Camoys Peerages*, 108.

TRESPASS.

One C. rented a farm under the plaintiff, his term in which expired on the 1st February, 1838. On the 2nd February, the plaintiff's agent demanded possession of the land; but the plaintiff refused to quit unless paid for certain improvements. The plaintiff thereupon brought an ejectment, and obtained actual possession on the 16th July:—Held, that the demand of possession on the 2nd February, gave the plaintiff such a constructive possession as to enable him to maintain trespass against

third persons coming on the land and carrying off the crops. *Hey v. Moorhouse*, 166.

TROVER.

Evidence of Conversion.

In trover against an executor, it appeared that the watch which was the subject-matter of the action had been given by the testatrix to one S. in September, 1837; that S. re-delivered it to the testatrix in March, 1838, for the purpose of its being pawned by her; that, on its being demanded by the plaintiff in December, 1838, the testatrix said that she would consult her solicitor; and that the testatrix died in March, 1839:—Held, that this was sufficient evidence to warrant the jury in finding a conversion within six months before the death. *Richmond v. Nicholson*, 134.

And see AGREEMENT—BANKRUPT, II., 2, 4—SHERIFF.

USURY.

By the rules of a mutual benefit society, portions of the stock or fund of the society were from time to time put up to competition amongst the members by way of loan at 5l. per cent. interest, in addition to the premium, the highest bidder obtaining the loan. The defendant, a member, bid 18l. 17s. 6d. for a loan of 80l., with 5l. per cent. interest:—Held, that the transaction was not usurious. *Silver v. Barnes*, 300.

VENDOR AND PURCHASER.

Time for Deduction of Title.

The defendant put up property for sale by public auction on the 18th September, subject (amongst others) to the following conditions—that the pur-

chaser should pay down a deposit of 10 per cent. and sign an agreement for payment of the remainder of the purchase-money on or before the 28th November; that a proper abstract should be delivered within fourteen days from the day of the sale, and a good title deduced at the vendor's expense, having regard to the conditions; the conveyance to be prepared by and at the expense of the purchaser, and left at the office of the vendor's solicitors for execution on or before the 10th November; and that all objections to the title should be communicated to the vendor's solicitors within twenty-eight days after the delivery of the abstract. In an action by the purchaser to recover back the deposit, on the ground that the vendor had not deduced a good title by the 28th November:—Held, on special demurrer, that the declaration was bad for not averring that a reasonable time for deducing a good title had elapsed before the commencement of the action—the conditions of sale naming no specific time for *that* purpose. *Sansom v. Rhodes*, 544.

VENUE.

Changing.

The court refused to bring back the venue in an action for an assault and battery, from Lincolnshire to London, on a suggestion that the plaintiff had by lecturing on the corn laws made himself obnoxious to the land-owners and farmers of the county, and provoked the hostility of the local papers in the conservative interest, in which paragraphs had appeared commenting upon the circumstances out of which the action arose; that the plaintiff had been placarded at Lincoln as the farmers' enemy; and that the defendant was a major in the Lincolnshire militia, and

connected with the conservative party in the county. *Seeley v. Ellison*, 498.

WARRANT OF ATTORNEY.

I. *Attestation of.*

The court set aside a warrant of attorney, and proceedings thereon, on the ground that the name of the attorney who attested the execution on the part of the defendant, was *suggested* to the defendant by the plaintiff's attorney. *Sed quære.* *Kemp v. Matthew*, 399.

II. *Appearance.*

It is no objection to a judgment on a warrant of attorney, that no appearance has been entered. *Bircham v. Tucker*, 469.

III. *Filing.*

Quære, whether a judgment and execution on a warrant of attorney not filed within twenty-one days after its execution, pursuant to the 3 Geo. 4, c. 39, be fraudulent and void as against the assignees under a fiat issued upon

an act of bankruptcy committed after execution executed. *Brook v. Mitchell*, 739.

WASTE.

A lease granted by virtue of a power enabling tenant for life to make leases without impeachment of waste, contained a proviso that the tenant should pay a further rent of 10% per acre for ploughing up pasture land or for managing the farm contrary to the covenants. In an action to recover the penalty, a motion in arrest of judgment on the ground that this amounted to a license to commit waste, was disallowed. *Bringloe v. Goodson*, 71.

WHALE FISHERY.

See INSURANCE.

WILL.

See DEVISE.

WITNESS.

Competency of—See EVIDENCE, II.

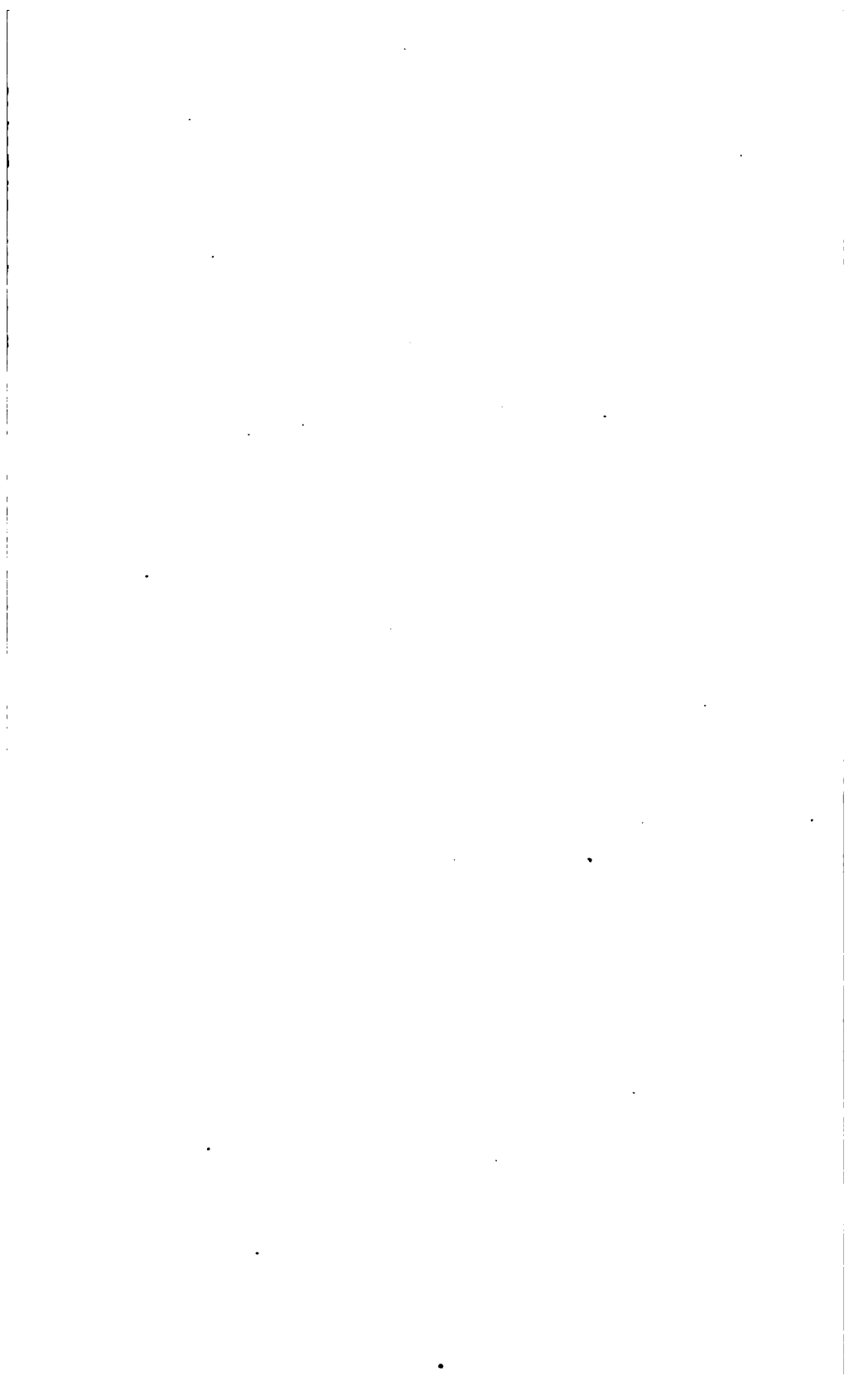
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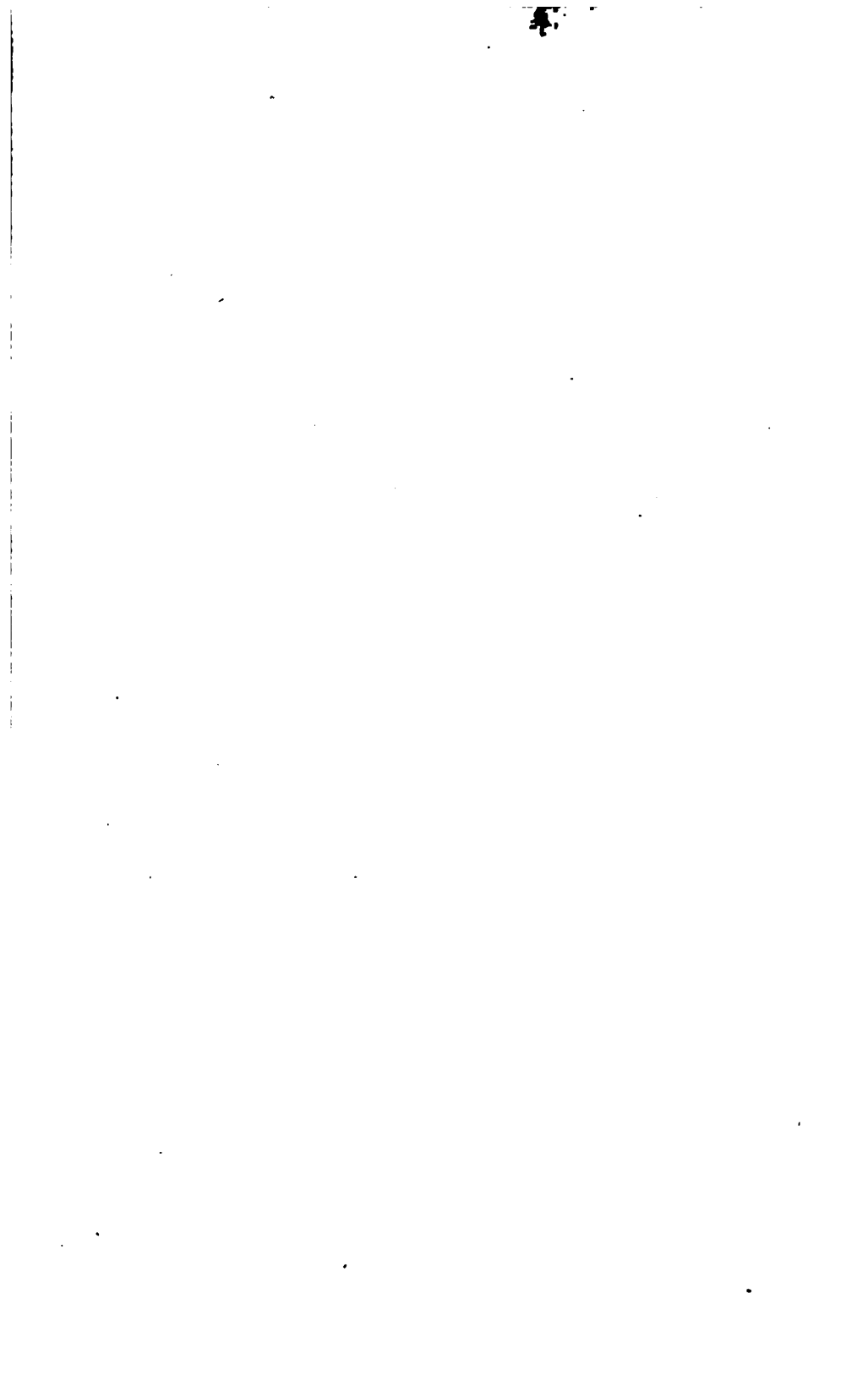
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